Supreme Court, U.S.
FILED

No. 04-321

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In The Supreme Court of the United States

THOMAS LARIMER,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, successor in interest to LOTUS DEVELOPMENT CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Americans with Disabilities Act's association provision, the disability must belong to plaintiff.

2. Whether the circuit court inappropriately devised categories to classify and determine the viability of association provision claims, thus discarding and ignoring caselaw and the statute.

3. Whether the Court should make a definitive ruling on the ADA's association provision.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Thomas Larimer is an individual. International Business Machines Corporation, successor in interest to Lotus Development Corporation, is a New York corporation. It has no parent corporation. No publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

Questions presented for review.....i

Parties to the proceeding.....ii

Table of contents.....iii

Table of authorities.....v

Opinions below.....1

Statement of jurisdiction.....1

Statutory provisions involved.....1

Statement of the case.....2

I. Basis for federal jurisdiction.....2

II. Overview of the case.....2

III. Factual background of the case.....3

IV. Proceedings below.....6

Reasons for granting the petition.....7

I. The petition for writ of certiorari should be granted because the Seventh Circuit's opinion puts it into conflict with other circuits and existing law.....8

II. The petition for writ of certiorari should be granted because the Supreme Court should establish a firm and clear ruling on the association provision of the ADA.....14

III. The petition for writ of certiorari should be granted because the District Court's evaluation of the evidence directly violated the long-established standards for summary judgment.....15

Conclusion.....17

Appendix

Appendix A
Seventh Circuit Court of Appeals Opinion
Dated June 3, 2004.....A-1

Appendix B
United States District Court for the Northern
District of Illinois Opinion
Dated April 29, 2003.....A-10

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....15, 16

Beck v. Dahn Corp,
1998 U.S. App. LEXIS 9709 (10 Cir. 1998).....14

Bragdon v. Abbott,
524 U.S. 624 (1998).....10, 11

Den Hartog v. Wasatch Academy,
129 F.3d 1076 (10th Cir. 1997).....7, 8, 14, 15

Duda v. Board of Education,
133 F.3d 1054 (7th Cir. 1998).....10

EEOC v. Prevo's Family Mkt.,
135 F.3d 1089 (6th Cir. 1998).....14

Furnish v. SVI Systems, Inc.,
270 F.3d 445 (7th Cir. 2001).....12

Hilburn v. Murata Elecs.,
181 F.3d 1220 (11th Cir. 1999).....14

Humphrey v. Memorial Hosps. Ass'n,
239 F.3d 1128 (9th Cir. 2001).....14

Jackson v. Service Engineering,
96 F.Supp.2d 873 (S.D. Ind. 2000).....8, 13

Larimer v. IBM,
370 F.3d 698 (7th Cir. 2004).....1, 3, 6, 7, 9, 10, 13, 14

Larimer v. IBM,
2003 U.S. Dist. LEXIS 7396 (N.D. Ill. 2003).....1, 6, 12, 13

Mack v. Great Dane Trailers,
308 F.3d 776 (7th Cir. 2002).....13

Micek v. City of Chicago,
1999 U.S. Dist. LEXIS 16263 (N.D. Ill. 1999).....8

Moore v. J.B. Hunt Transport, Inc.,
221 F.3d 944 (7th Cir. 2000).....13

Oliveras-Sifre v. Puerto Rico Dep't of Health,
214 F.3d 23 (1st Cir. 2000).....14

Rizzo v. Children's World Learning Ctrs., Inc.,
213 F.3d 209 (5th Cir. 2000).....14

Salley v. Circuit City Stores,
160 F.3d 977 (3rd Cir. 1998).....14

Shager v. Upjohn,
913 F.2d 398 (7th Cir. 1990).....16

Sinkler v. Midwest Prop. Mgt.,
209 F.3d 678 (7th Cir. 2000).....10

Toyota Mfg., Kentucky, Inc. v. Williams,
534 U.S. 184 (2002).....11

Statutes

28 U.S.C. §1254(1).....1

29 U.S.C. §1132.....2

42 U.S.C. §12101.....2

42 U.S.C. §12102(2).....2

42 U.S.C. §12102(2)(A).....12

42 U.S.C. §12102(2)(C).....13

42 U.S.C. §12111(8).....2, 3, 6, 9, 10

42 U.S.C. §12112(b)(4).....1, 3, 7

Rules

United States Supreme Court Rule 10.....7

Other Authorities

29 C.F.R. §1630.....11

29 C.F.R. §1630.2(i).....12

29 C.F.R. Part 1630.2(j)(1).....12

29 C.F.R. Part 1630.2(j)(2)(i)-(iii).....12

29 C.F.R. Pt. 1630, App.....13

OPINIONS BELOW

The June 3, 2004 opinion of the United States Court of Appeals for the Seventh Circuit is reported at Larimer v. IBM, 370 F.3d 698 (7th Cir. 2004) and is reprinted in the Appendix at A1-A9. The April 29, 2003 order of the United States District Court for the Northern District of Illinois is reported at Larimer v. IBM, 2003 U.S. Dist. LEXIS 7396 (N.D. Ill. April 29, 2003) and is reprinted in the Appendix at A10-A40.

STATEMENT OF JURISIDCTION

The Seventh Circuit issued its opinion on June 3, 2004. This petition for certiorari is timely because petitioner filed it within 90 days of June 3, 2004. The Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Americans with Disabilities Act ("ADA"). Specifically, the ADA prohibits:

> ...excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual has a relationship.

42 U.S.C. §12112(b)(4).

The ADA defines a "qualified individual with a disability" as:

> ...an individual with a disability who, with or without reasonable accommodation, can perform the essential

> functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential...

42 U.S.C. §12111(8).

> The ADA defines a "disability" as:
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
>
> (B) a record of such impairment; or,
>
> (C) being regarded as having such impairment.

42 U.S.C. §12102(2).

STATEMENT OF THE CASE

I. Basis for federal jurisdiction.

Mr. Larimer invoked the lower court's jurisdiction by bringing a two count complaint against International Business Machines Corporation under the laws of the United States. Count I alleges a violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101 et seq. Count II alleges retaliation in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132.

II. Overview of the case.

On an appeal from the district court's grant of summary judgment to IBM, the Seventh Circuit Court of Appeals affirmed and held that Mr. Larimer was not entitled

to relief under 42 U.S.C. §12111(8) because he had no disability and that he was not entitled to relief under 42 U.S.C. §12112(b)(4) under the association provision of the ADA. Larimer, 370 F.3d at 700-01.

Mr. Larimer respectfully submits that the circuit court is in error. First, under the ADA association provision, the disability need not be Mr. Larimer's. Second, the circuit court invented from whole cloth baseless and irrelevant categories concerning the law. Third, the Court should make a definitive ruling on the ADA's association provision.

The Court should grant this petition for writ of certiorari because the circuit court's opinion substantially deviates from other circuits' interpretation of the ADA's association provision. The Court has not yet rendered an opinion on the ADA association provision, an important question of federal law best decided by the Court.

III. Factual background of the case.

On August 28, 2000, IBM hired Thomas Larimer as a software products salesman. Mr. Larimer had good working relationships with his supervisors, was admired and respected, and received a favorable performance review. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 8, ¶¶1-4.

Mr. Larimer was an extraordinarily productive employee. In fact, Mr. Larimer was one of the most successful and productive employees in the Chicago office and Midwest region. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 9, ¶¶6-9.

In 2000, Mrs. Larimer--also an IBM employee--became pregnant with Mr. Larimer's twin children. She was

hospitalized and was placed on complete bed rest during the remainder of her pregnancy. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 12, ¶¶28-29.

On May 11, 2001, Mrs. Larimer gave birth to twin girls 12 weeks prematurely. Both had low birth weights and were hospitalized. Throughout their hospitalization, the lives of both girls were threatened. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 12, ¶¶30-32.

From birth, Emelia and Sarah were unable to breathe on their own and required mechanical ventilation. Without mechanical ventilation, Emelia and Sarah would not have survived. Emelia and Sarah were unable to eat on their own and were fed first intravenously and then through a tube in the nose or mouth. Absent mechanical feeding, Emelia and Sarah would not have survived. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 13, ¶¶33-35.

Emelia later developed jaundice. She also suffered from apnea of prematurity, a condition where breathing ceases for short periods of time. She required cardiorespiratory monitoring and medication. After discharge, she required frequent visits to the pediatrician, physical therapist, opthamologist, and other evaluation programs. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 13, ¶¶36-37.

Emelia and Sarah continue to suffer from various severe medical complications and conditions. Emelia's most serious and potentially long-lasting complication is Grade III Intraventricular Hemmorhage (IVH), a bleeding in her brain. Emelia's Grade III bleed can cause permanent brain damage. Common long-term complications of the IVH include cerebral palsy, mental retardation, motor problems, seizures,

deafness, or blindness. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 13-14, ¶¶38-39.

Emelia also suffers from periventricular leukomalcia (PVL), a problem with brain tissue resulting in the formation of a cyst which destroys brain tissue and can cause hemmorages. PVL can cause cerebral palsy and learning disabilities. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 14, ¶40.

The medical bills incurred for the pregnancy, delivery, and treatment of Emelia and Sarah approach $1,000,000. The principal treatments occurred during the time that IBM discriminated against Mr. Larimer. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 15, ¶46.

On June 21, 2001, an IBM supervisor, John Freimark, met with Mr. Larimer and told him for the very first time that he was not performing adequately. Before that meeting, IBM decided that he would terminate Mr. Larimer. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 9, ¶9.

During the course of this meeting, it became obvious to Mr. Larimer that Mr. Freimark's criticism was based upon untruths and half-truths and that it was merely pretextual. During the meeting, Mr. Freimark presented Mr. Larimer with two options: to assume a "performance plan" or to take a severance package. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 10, ¶10.

Mr. Larimer refused to resign from IBM. He elected to enter the performance plan that was later termed a "pre-performance plan." Mr. Larimer believed that the plan required him to perform impractical and impossible activities in order to compensate for his allegedly "substandard" work

performance. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 10-11, ¶¶13-16.

On August 17, 2001, IBM terminated Mr. Larimer's employment. R.O.A. at 37, Plaintiff's Local Rule 56.1(b) Submission at 11, ¶20, and 9, ¶6.

IV. Proceedings below.

United States District Judge Lefkow of the Untied States District Court for the Northern District of Illinois, Eastern Division, disposed of the case by granting IBM's motion for summary judgment on all counts. Larimer, 2003 U.S. Dist. LEXIS at *44.

Concerning the ADA claim, the district court ruled that Mr. Larimer did not present sufficient evidence to prove that Emelia and Sarah were "disabled." Id. at *31. On the ERISA claim--with overlapping factual elements and arguments--the district court found that there was insufficient evidence in the record to show that IBM considered or relied upon medical issues or health insurance claims in discharging Mr. Larimer. Id. at *43. The district court further found that Mr. Larimer did not meet the requirement of being "qualified" for his job. Id. at *42.

The Seventh Circuit Court of Appeals, by United States Circuit Judges Bauer, Posner, and Easterbrook upheld the district court's grant of summary judgment against Mr. Larimer. Larimer, 370 F.3d at 703. The circuit court ruled--the opinion is somewhat murky--that Emelia and Sarah were not disabled and that Mr. Larimer was not entitled to relief under 42 U.S.C. §12111(8) because he himself was not a disabled individual. Id. at 700. The circuit court then indulged in a baseless and unprecedented exploration of

three types of situations purportedly contemplated by the association provision of the ADA. Id. at 701. It concluded that this case fits none of the three new "categories," attacked the Den Hartog test[1] and held, in any event, that Mr. Larimer did not satisfy it. Id. According to the circuit court, Mr. Larimer was likewise not entitled to relief under 42 U.S.C. §12112(b)(4) under the association provision of the ADA. Id.

REASONS FOR GRANTING THE PETITION

United States Supreme Court Rule 10 establishes considerations used to decide whether the Court will exercise its judicial discretion in granting a petition for a writ of certiorari.

One consideration is whether the circuit court entered a decision in conflict with the decision of other circuit courts on the same important matter. Rule 10(a). A second consideration is whether the circuit court decided an important question of federal law that has not been, but should be, decided by the Court. Rule 10(c). A third consideration is whether the circuit court or the district court departed from the normal course of judicial proceedings as to require an exercise of the Court's supervisory power. Rule 10(a).

These considerations are present in this case. First, the Seventh Circuit deviated from the law established by Den Hartog and threatens to create a confusing split between circuits. Second, the Court has not yet addressed the

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[1] Den Hartog v. Wasatch Academy, 129 F.3d 1076 (10th Cir. 1997) is, to date, the leading case on the ADA's association provision. See the case citations in the text below.

association provision of the ADA. It is an important question of federal law. The Court should make a determinate ruling on the matter. Finally, the district court departed from the standards of summary judgment and the departure was sanctioned by the Seventh Circuit such that this court should invoke its supervisory authority.

I. The petition for writ of certiorari should be granted because the Seventh Circuit's opinion puts it into conflict with other circuits and existing law.

The decision below deviates from the standard association analysis first established by Den Hartog v. Wasatch Academy, 129 F.3d 1076 (10th Cir. 1997), a standard that was followed by district courts throughout the Seventh Circuit. See, e.g., Micek v. City of Chicago, 1999 U.S. Dist. LEXIS 16263, *11 (N.D. Ill. 1999); Jackson v. Service Engineering, 96 F.Supp.2d 873, 879 (S.D. Ind. 2000).

To prevail on an ADA association claim, a plaintiff must prove by a preponderance of evidence that: (1) plaintiff was qualified for the job, (2) plaintiff suffered an adverse employment action, (3) the employer knew at the time that plaintiff was disabled or had a relative or associate with a disability, and (4) the adverse employment action occurred under circumstances giving rise to a reasonable inference that the disability of the relative or associate was a determining factor in the decision. Den Hartog, 129 F.3d at 1083-85.

On IBM's summary judgment motion, in the face of overwhelming evidence to the contrary, the district court ruled that, as a matter of law, he did not establish that his daughters were disabled or that IBM regarded them as

disabled. The district court confined itself solely to the issue of whether Emelia and Sarah were disabled and did not address the other elements of the prima facie case against IBM.

The association provision requires that the associate have a "disability." It was on this basis--and on this basis alone--that the district court found against Mr. Larimer. The district court ruled that, as a matter of law, Emelia and Sarah Larimer were not disabled. This ruling defies the plain facts of the case and represents a long and erroneous stride away from the ADA's intent and purpose. The statute, the implementing regulations of the EEOC, and the judicial interpretations allow only one conclusion: Emelia and Sarah were and are disabled.

For its part, the Seventh Circuit significantly deviated from both the established law on the subject, intent, and clear meaning of the ADA when it ruled that Mr. Larimer did not adequately establish his association claim because *he himself* was not disabled. Larimer, 370 F.3d at 700.

There is no requirement contemplated by the law or within its reasonable meaning that Mr. Larimer himself must be disabled. The whole idea of the association provision is that the individual plaintiff has no disability, but he is nonetheless protected against discrimination because of his associates (especially family).

It is true, as the Seventh Circuit pointed out, that the only definition of "qualified individual" in the ADA is the definition of a "qualified individual with a disability." Larimer, 370 F.3d at 700, citing 42 U.S.C. §12111(8). However, the Seventh Circuit's conclusion from this fact is incorrect.

A prudent jurist would utilize the definition provided by the legislature in the statute as far as possible. The result, of course, would be to define "qualified individual" just as 42 U.S.C. §12111(8) does, but exclude the requirement that the individual must be disabled. There is no question that the legislature would have intended this to be the result. Certainly, it would not have provided the association provision at all if it could easily be eviscerated by a definition of terms.

Instead, the Seventh Circuit turns the statute on its head. It abandons the established statutory and case-based rule that a qualified individual is one who can perform the essential functions of her or her job. Duda v. Board of Education, 133 F.3d 1054, 1059 (7th Cir. 1998); 29 C.F.R. Pt. 1630, App. The Seventh Circuit opinion refuses to follow this established principle of law, yet establishes nothing in its absence. Its opinion merely transitions to another topic, refusing to supply a definition of "qualified individual" in the place of the definition it just discarded. Larimer, 370 F.3d at 700. The Court must correct this error and determine, once and for all, what it is to be a "qualified individual" within the meaning of the ADA's association provision.

To show that Emelia and Sarah are disabled under 42 U.S.C. §12102(2)(A), Mr. Larimer must demonstrate that they suffered an impairment, that the impairment affects major life activities, and that the impairment substantially limits such major life activities. Bragdon v. Abbott, 524 U.S. 624, 631 (1998); Sinkler v. Midwest Prop. Mgt., 209 F.3d 678, 683 (7th Cir. 2000).

Emelia and Sarah both suffered impairments at the time of their birth, during Mr. Larimer's employment, during

IBM's mistreatment of him, during this litigation, and to the present. The EEOC's implementing regulations define a "physical or mental impairment"--satisfying the first element of Bragdon's three part test--as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, gnito-urinary, hemic and lymphatic, skin, and endocrine...

29 C.F.R. Part 1630.

The record evidence shows that Emelia and Sarah have suffered, currently suffer, and will continue to suffer from impairments in a number of these categories. The medical evidence is well-developed both in the record on appeal and in Mr. Larimer's statement of facts.

The impairments acknowledged by the district court limit the life activities of Emelia and Sarah under Bragdon. A major life activity under the ADA is an activity of central importance to everyday life. The EEOC cites examples of such activities as walking, seeing, hearing, breathing, and learning. Toyota Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002); 29 C.F.R. §1630.2(i).

The numerous impairments suffered by Emelia and Sarah Larimer substantially limit major life activities besides merely affecting them. The EEOC's implementing regulations define "substantially limits" as:

> (i) unable to perform a major life activity that the average person in the general population can perform;

> (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. Part 1630.2(j)(1).

In determining whether a person is substantially limited, courts examine a number of factors. These factors include:

> (i) the nature and severity of the impairment;
>
> (ii) the duration or expected duration of the impairment;
>
> (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. Part 1630.2(j)(2)(i)-(iii).

The district court cited these factors and concluded that the twins' acknowledged disabilities do not affect their life activities. Larimer, 2003 U.S. Dist. LEXIS at *29. Emelia was unable to breathe on her own. Breathing is unquestionably a major life activity. 29 C.F.R. §1630.2(i). Emelia and Sarah were both unable to feed on their own. Eating, as a matter of law, is a major life activity. Furnish v. SVI Systems, Inc., 270 F.3d 445, 449 (7th Cir. 2001). Permanent brain damage affects one's major life activities. See 29 C.F.R. §1630.2(i). Emelia's PVL will affect her ability to learn, a major life activity. 29 C.F.R. §1630.2(i).

Both lower courts wrongly conclude that Emelia and Sarah's disabilities were "merely temporary." Larimer, 2003 U.S. Dist. LEXIS at *29; Larimer, 370 F.3d at 702. First, although temporary conditions may not be covered under the ADA, the same is not true when a disability is later cured in some way. Jackson, 96 F.Supp.2d at 881.

Viewing the facts as the lower court did, the result for Mr. Larimer should be the same. When Mr. Larimer was terminated in violation of the ADA, his children labored under manifold disabilities affecting all of their major life activities. Merely because the lower court now adjudges the children as "less impaired" than they were when Mr. Larimer was fired does not mean that they were not disabled as a matter of law.

Even if the twins were not disabled, IBM may be liable under 42 U.S.C. §12102(2)(C) if it "regarded [them] as" having a disability or impairment.

To show that IBM regarded the twins as disabled, Mr. Larimer must demonstrate that IBM either mistakenly believed that the twins had an impairment that substantially limits one or more life activities or that an actual non-limiting impairment limits one or more major life activities. Mack v. Great Dane Trailers, 308 F.3d 776, 780 (7th Cir. 2002). Mr. Larimer must show that IBM knew about the impairment and believed that it was substantially limiting. Moore v. J.B. Hunt Transport, Inc., 221 F.3d 944, 954 (7th Cir. 2000). The facts demonstrate that Mr. Larimer met his burden.

The circuit court indulged in a baseless and unprecedented exploration of three types of situations purportedly contemplated by the association provision of the ADA. With no foundation or base whatsoever, it ruled that

the association provision of the ADA is meant to cover only the "expense," "disability by association," and "distraction" fact situations. Larimer, 370 F.3d at 700.

The circuit court then summarily concluded that Mr. Larimer's case did not fit into any of those categories. Id. at 701. There is no requirement, either in the ADA or in any of the association provision cases, that a plaintiff's action fall into one of these categories. The Court should not allow the lower court to create and impose one.

II. The petition for writ of certiorari should be granted because the Supreme Court should establish a firm and clear ruling on the association provision of the ADA.

The Court should grant certiorari to clarify the ADA's association provision and undo the damage done to the law and the confusion caused by the Seventh Circuit's opinion.

The instant case excluded, most other circuits have directly confronted the issue of association discrimination and have relied upon Den Hartog. Circuits dealing with the issue include Oliveras-Sifre v. Puerto Rico Dep't of Health, 214 F.3d 23 (1st Cir. 2000), Salley v. Circuit City Stores, 160 F.3d 977 (3rd Cir. 1998), Rizzo v. Children's World Learning Ctrs., Inc., 213 F.3d 209 (5th Cir. 2000)(noted among conflicting authorities), EEOC v. Prevo's Family Mkt., 135 F.3d 1089 (6th Cir. 1998)(cited in dissenting opinion), Humphrey v. Memorial Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001), the Tentth Circuit in sixteen different cases, including Beck v. Dahn Corp, 1998 U.S. App. LEXIS 9709 (10 Cir. 1998), Hilburn v. Murata Elecs., 181 F.3d 1220 (11th Cir. 1999).

With this myriad of different opinions, it now falls upon the Court to make sense of them all and to craft a single test and a single prima facie case for ADA association discrimination. The caselaw almost always follows the Den Hartog analysis. Mr. Larimer suggests that this is the appropriate analysis to follow.

III. The petition for writ of certiorari should be granted because the District Court's evaluation of the evidence directly violated the long-established standards for summary judgment.

In addition to its other roles, the Court exercises a supervisory function over lower courts, both at the appellate and district court level. In the case at bar, the district court grossly abused its authority by making all permissible inferences in favor of the movant, IBM. Further, the circuit court sanctioned this failure to abide by established precedent. Although the matter was raised in the briefs, the Seventh Circuit failed to correct the district court's improper treatment of the record.

The district court did not construe the facts in the light most favorable to Mr. Larimer and did not view all reasonable inferences in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). It simply ignored Mr. Larimer's facts. In the section labeled "Larimer's Employment at IBM," the lower court notes IBM's fact statement approximately 60 times. Mr. Larimer's fact statement--entitled to construction in the light most favorable to him--is mentioned only nine times. In its treatment of "IBM's self-managed plan," the lower court accepts only IBM's fact statements and makes no reference to Mr. Larimer's statement of facts.

Although not conclusive, this observation leads one to believe that Mr. Larimer's factual assertions were not taken seriously by the lower court and certainly not viewed in a light favorable to him. Id.

If the lower court felt that the children may not have continued to be disabled or that their conditions may have been temporary, these issues should have been submitted to a fact finder at trial and should not have been decided by summary judgment. Id.

The circuit court failed to exercise its supervisory function by correcting the district court. Although the issue was explicitly raised in the briefs before the appellate court, it failed to take this into account.

At worst, if either of the lower courts found facts prejudicial to Mr. Larimer, it erred in deciding between them and those offered by Mr. Larimer at the summary judgment phase. There is no question but that, if an inference of improper motive can be drawn, "there must be a trial." Shager v. Upjohn, 913 F.2d 398, 401 (7th Cir. 1990).

Both the district court and the circuit court ignored this injunction throughout their opinions. Instead, they chose at every stage to make factual judgments and determinations inappropriate for a motion for summary judgment. The rules regarding review of evidence on summary judgment are long-established. They are procedural bedrock upon which our court system is based. If district courts are permitted to ignore them, and circuit courts condone their conduct, there can be little civil about federal civil procedure.

CONCLUSION

A petition for writ of certiorari should issue and the Seventh Circuit's decision in Larimer v. IBM should be reversed and remanded to the United States District Court for further proceedings.

Respectfully submitted.

GREGORY A. ADAMSKI

SEPTEMBER 2004

No. _____

In The Supreme Court of the United States

THOMAS LARIMER,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, successor in interest to LOTUS DEVELOPMENT CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX

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THOMAS LARIMER, Plaintiff-Appellant, v. INTERNATIONAL BUSINESS MACHINES CORP., Defendant-Appellee.

No. 03-2256

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

370 F.3d 698; 2004 U.S. App. LEXIS 10788; 15 Am. Disabilities Cas. (BNA) 1070; 32 Employee Benefits Cas. (BNA) 2678;1 Accom. Disabilities Dec. (CCH) 11-118

December 11, 2003, Argued
June 3, 2004, Decided

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 02 C 3160. Joan Humphrey Lefkow, Judge. Larimer v. IBM, Corp., 2003 U.S. Dist. LEXIS 7396 (N.D. Ill., Apr. 29, 2003)

DISPOSITION: Affirmed.

COUNSEL: For THOMAS LARIMER, Plaintiff-Appellant: Gregory A. Adamski, Edward H. Bogle, ADAMSKI & CONTI, Chicago, IL USA.

For INTERNATIONAL BUSINESS MACHINES CORPORATION, a successor in interest to LOTUS DEVELOPMENT CORPORATION, Defendant-Appellee: Lawrence C. DiNardo, JONES DAY, Chicago, IL USA.

JUDGES: Before BAUER, POSNER, and EASTERBROOK, Circuit Judges.

OPINIONBY: POSNER

OPINION: **[*699]** POSNER, *Circuit Judge*. Thomas Larimer, a salesman for IBM, was fired and brings suit against the company under both ERISA and the Americans with Disabilities Act. The district judge granted summary judgment for the defendant.

Larimer was hired in August of 2000, and in May of the following year his wife, who was also an employee of IBM, gave birth to twin daughters after only 29 weeks of pregnancy. At birth the two girls suffered from a variety of serious medical conditions owing to their prematurity, including respiratory distress, jaundice, apnea, and sepsis. One of the girls also had bleeding in the brain and the other had a lesion on her nose. They were hospitalized **[**2]** for almost two months at a total expense of almost $ 200,000, all of which IBM's employee health plan paid for. By the close of discovery in January 2003 the two children seemed to be healthy and normal, but there is some probability (how great a one is unknown) that they will develop serious physical or mental handicaps as they grow older.

Larimer was fired in August of 2001, shortly after the children came home from the hospital. His principal claim is that IBM violated the Americans with Disabilities Act, by firing him because his daughters are disabled. Are they? They seem fine at present, and so the question, left open in *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1026 and n. 2 (9th Cir. 2003), and not elsewhere answered definitively, is whether a possible, or even probable, future disability can ever be a disability that triggers the protections of the Act. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.8; *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1081-82 (10th Cir. 1997); *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209, 214 (4th Cir. 1994). The Supreme **[*700]** Court's decision **[**3]** in *Sutton v. United Air Lines, Inc.*, 527 U.S.

471, 482-83, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999), suggests (in dictum--the question before the Court was whether a person who has to wear glasses is disabled because without them he couldn't see) that the answer is "no" unless the individual is mistakenly regarded by his employer as having a disability; such a mistake is an alternative trigger of the Act's protections. 42 U.S.C. § 12102(2)(C); *EEOC v. Rockwell Int'l Corp.*, 243 F.3d 1012, 1014-15 (7th Cir. 2001).

Larimer must lose even if his daughters are disabled or regarded as disabled. He is suing not on their behalf but on his own, under a provision of the ADA that forbids discrimination against "a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). Notice first the oddity of requiring the plaintiff to show that *he* is a "qualified individual," since HN1 the only definition in the ADA of a "qualified individual" is the definition of "qualified individual with a disability" as "an individual **[**4]** with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). If this is the "qualified individual" to which the association provision (section 12112(b)(4)) refers, then Larimer cannot obtain any relief under that provision because he has no disability! The term "qualified individual" in that provision must simply mean qualified to do one's job, as assumed though nowhere discussed in the legislative history and the cases. H.R. Rep. 101-485, pt. 2, at 61-62 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 343-44; 29 C.F.R. § 1630.8; *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1230-31 (11th Cir. 1999); *Den Hartog v. Wasatch Academy, supra*, 129 F.3d at 1083-85; *Ennis v. National Ass'n of Business & Educational Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995); *Rocky v. Columbia Lawnwood Regional Medical Center*, 54 F. Supp. 2d 1159, 1164-65 (S.D. Fla. 1999).

HN2 Three types of situation are, we believe, within the intended scope **[**5]** of the rarely litigated (this is our first case) association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours. The qualification concerning the need for an accommodation (that **[**6]** is, special consideration) is critical because the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person. 29 C.F.R. § 1630.8; *Den Hartog v. Wasatch Academy, supra*, 129 F.3d at 1083-85; *Tyndall v. National Education Centers, Inc., supra*, 31 F.3d at 214.

[*701] This case fits none of the categories. (2) can be ruled out peremptorily; the girls' premature birth and resulting medical afflictions are neither communicable to Larimer nor predictive of his becoming ill or disabled. Likewise (3): there is no evidence that Larimer was absent or distracted at work because of his wife's pregnancy or the birth and hospitalization of his daughters. As for (1), there is to begin

with no evidence that health benefits are in the budget of the unit of IBM that employed and discharged Larimer. Cf. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 761 (5th Cir. 1996). Benefits can be in a unit's budget in multiple ways. For example, IBM may charge every manager's budget with a fringe-benefit allocation for each employee in his unit that is **[**7]** equivalent to the premiums for health insurance allocable to the employee, or, alternatively, with the dollar amounts actually paid in benefits to the unit's employees or their dependents. In the latter case but not the former, the manager would care about the actual expense for health services to the relatives of an employee in his unit because that expense would be in his budget. But there is no evidence that expenses are accounted for in that fashion. If IBM has a profit-sharing plan or pays bonuses based in part on company-wide performance, all employees who participate in the plan or receive such a bonus--and presumably they would include Larimer's supervisors--have a financial stake in the company's performance and thus a stake, however attenuated, in the firing of an "expensive" employee. But Larimer has made no effort to pitch his case on such ground either.

Having no evidence, Larimer falls back on the ubiquitous *McDonnell Douglas* test for a prima facie case of employment discrimination. *Den Hartog*, the case with the most extensive discussion of the ADA's association provision, purports to use a version of the test that requires the plaintiff to show that "(1) the **[**8]** plaintiff was 'qualified' for the job at the time of the adverse employment action; (2) the plaintiff was subjected to adverse employment action; (3) the plaintiff was known by his employer at the time to have a relative or associate with a disability; (4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision." 129 F.3d at 1085; see also *McGuinness v. University of New Mexico School of Medicine*, 170 F.3d

974, 979-80 (10th Cir. 1998). The test is sound, but it's not *really* a version of the *McDonnell Douglas* test because it requires the plaintiff to prove all the elements of what would be the prima facie case of discrimination against a relative or other associate of a disabled person even if there had never been a *McDonnell Douglas* case. This is apparent from the fourth element of the *Den Hartog* test, which requires the plaintiff to produce evidence that he was discriminated against because of the disability of a person with whom he has a relationship or other association. Compare this to the corresponding **[**9]** part of the *McDonnell Douglas* test, which in the case of employment discrimination based on race or some other invidious ground requires the plaintiff to prove only that he was replaced by someone of a different race--not that he was discriminated against because of his race. A plaintiff who can produce evidence of actual discrimination on the basis of disability has made out a prima facie case without regard to *McDonnell Douglas*.

A true parallel to *McDonnell Douglas* in the association setting would allow a prima facie case to be made out if the plaintiff, having shown that he was qualified in the sense of meeting his employer's expectations **[*702]** (not a "qualified individual *with a disability*," as we explained earlier), went on to show that his employer knew he had a relationship or association with a disabled individual, that the employer fired him, and that he was replaced by someone who lacked such a relationship or association. This would not however be a very sensible test--which shows that there may be limits even to the cloning of *McDonnell Douglas*. When deciding whether to adapt *McDonnell Douglas* to a new legal setting, a court should ask not "how can we **[**10]** create a formula closest to that one?" but "what conditions imply a comparably high likelihood that the employer is violating the statute?" In the present setting a true *McDonnell Douglas* test, as distinct from the *Den Hartog* test, would generate the prima facie case of disability discrimination when only the most tenuous basis for an

inference of discrimination was present--for example when the employer knew merely that the plaintiff had a second cousin who was sterile, or that he had shaken hands with a person who was HIV-positive. The latter example would be ruled out by cases that hold that casual associations with a disabled person are not protected by the ADA, *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215-16 (4th Cir. 2002); Oliveras-Sifre v. Puerto Rico Dept. of Health, 214 F.3d 23, 26 (1st Cir. 2000); *O'Connell v. Isocor Corp.*, 56 F. Supp. 2d 649, 653 (E.D. Va. 1999), but probably not the former; for in 29 C.F.R. § 1630.8 we read that HN3 "it is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual **[**11]** because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association." Better to require, as *Den Hartog* does though not in precisely these words, that the plaintiff present evidence that his case falls in one of the three categories in which an employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.

Larimer's alternative claim is that his discharge violated ERISA. The usual ERISA claim is for benefits, but the expense of the girls' medical treatments was fully defrayed by IBM and what Larimer is arguing is that IBM fired him because of annoyance at having to pay so much, which may grow to be even more in the future should either or both of the girls develop serious physical or mental handicaps. In other words, the claim is that IBM retaliated against Larimer for exercising his rights under IBM's welfare benefits plan. 29 U.S.C. § 1140. He has no evidence of this, just as he has no evidence of disability discrimination, but in *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 644 (7th Cir. 2002), **[**12]** we authorized the following "adaptation of *McDonnell Douglas* to HN4 the retaliation context": "the plaintiff [must] show that after filing the

charge [in the present case, after applying for atypically large benefits] only he, and not any similarly situated employee who did not file a charge [in this case, did not apply for atypically large benefits], was subjected to an adverse employment action even though he was performing his job in a satisfactory manner." See also *Rogers v. City of Chicago*, 320 F.3d 748, 754-55 (7th Cir. 2003). *Stone* was not an ERISA case, but the standard it sets forth is appropriate to such cases. It is true that one finds courts saying that the plaintiff in an ERISA retaliation case must show that the defendant had a "specific intent" to punish him for asserting rights under the plan. *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882, 892 (7th Cir. 2001); *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998); *Humphreys v.* **[*703]** *Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992). But all that this means is that since the HN5 forbidden retaliation is retaliation **[**13]** for claiming ERISA benefits, the plaintiff cannot prevail unless he shows that there was an ERISA plan and presents evidence from which the trier of fact can infer that the defendant's motivation in taking the adverse action of which the plaintiff is complaining was indeed to thwart his right to benefits. That is the ultimate question and is separate from what must be shown to establish merely the prima facie case.

Had Larimer identified a similarly situated employee of IBM who had not applied for substantial welfare benefits yet had been treated better than he, he would have made out a prima facie case of retaliation under *Stone*--provided, as in any *McDonnell Douglas* case, that he also showed that he was performing his job in a manner that satisfied his employer's legitimate expectations. *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1178-79 (7th Cir. 1997). He strikes out on both counts. Declining ostrich-like to mention, let alone try to distinguish, *Stone,* even though his opponent relies heavily on it, he makes no effort to identify a comparable employee of IBM who did not apply for atypically large welfare

benefits and was treated better than Larimer [**14] was, though it would be easy to find such an individual if one existed. Nor does he show that he was performing up to his employer's expectations--in fact he was fired because he did *not* perform up to those expectations. He was a new hire and the uncontradicted evidence, described at length in the district court's opinion and unnecessary to repeat here, demonstrated that he failed to obtain an adequate understanding of the product that he had been hired to sell (Lotus software) and as a result was unable to convince prospective customers that the product was the answer to their needs. He was especially poor at convincing them to buy the various ancillary services that are an important part of the revenue of many software producers, including IBM. His discharge had nothing to do with the expense incurred by IBM with respect to his daughters.

AFFIRMED.

THOMAS LARIMER, Plaintiff, vs. INTERNATIONAL BUSINESS MACHINES, CORPORATION, successor in interest to LOTUS DEVELOPMENT CORP., Defendant.

No. 02 C 3160

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2003 U.S. Dist. LEXIS 7396; 14 Am. Disabilities Cas. (BNA) 925; 30 Employee Benefits Cas. (BNA) 2189

April 29, 2003, Decided
May 1, 2003, Docketed

SUBSEQUENT HISTORY: Affirmed by Larimer v. IBM Corp., 2004 U.S. App. LEXIS 10788 (7th Cir. Ill., June 3, 2004)

PRIOR HISTORY: Larimer v. IBM, 2003 U.S. Dist. LEXIS 7393 (N.D. Ill., Apr. 29, 2003)

DISPOSITION: **[*1]** IBM's motion for summary judgment granted.

COUNSEL: For THOMAS LARIMER, plaintiff: Gregory Adam Adamski, Karen Conti, Adamski & Conti, Chicago, IL.

For INTERNATIONAL BUSINESS MACHINES CORPORATION, defendant: Lawrence Charles DiNardo, Jill Susan Vorobiev, Jones Day, Chicago., IL.

JUDGES: JOAN HUMPHREY LEFKOW, United States District Judge.

OPINIONBY: JOAN HUMPHREY LEFKOW

OPINION: MEMORANDUM OPINION AND ORDER

In this action filed by plaintiff, Thomas Larimer ("Larimer"), alleging discrimination based on association in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.* (Count I), and termination in violation of § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (Count II), defendant, International Business Machines, Corporation ("IBM"), has moved under Rule 56, Fed. R. Civ. P., for summary judgment. The court has jurisdiction over the claims pursuant to 28 U.S.C. § 1331, 29 U.S.C. § 1132(a)(3) and 42 U.S.C. § 2000e-5(f). **[*2]** For the reasons set forth below, the motion for summary judgment is granted.

SUMMARY JUDGMENT STANDARDS

HN1 Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed R. Civ. P. 56(c) Advisory Committee's notes. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In response, the nonmoving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324; *Insolia* v. *Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). A material fact must be outcome determinative under the governing law. *Insolia*, 216 F.3d at 598-99. **[*3]** Although a bare contention that an issue of fact exists is insufficient to create a factual

dispute, *Bellaver* v. *Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000), the court must construe all facts in a light most favorable to the nonmoving party as well as view all reasonable inferences in that party's favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

FACTS STATED IN A LIGHT MOST FAVORABLE TO PLAINTIFF

On August 17, 2001, Larimer was fired from his employment at IBM. Previously, on May 11, 2001, Larimer's wife, Juliann, gave birth to Larimer's twin daughters, Emelia and Sarah Larimer, who were born prematurely and suffered from numerous medical conditions listed below. Larimer maintains that his firing was based on his children's alleged disability in violation of the ADA. In addition, Larimer alleges that he was terminated because he filed health care claims on behalf of his daughters, who were covered under the health plan IBM provided to Larimer, in violation of § 510 of ERISA.

Larimer's Employment at IBM

The Lotus Software Sales unit of IBM employed Larimer as a Senior **[*4]** Sales Specialist in Chicago from August 28, 2000 through August 17, 2001. (Def. L.R. 56.1 P 4.) Prior to being hired by IBM, Larimer held a variety of other sales positions at companies such as Midwest Visual Communications, Tandberg, and Lucent Technologies. (Def. L.R. 56.1 P 7.) Larimer was hired by IBM based on a favorable interview process, checked references, and a comparison to other individuals interviewed for the position. (Pl. L.R. 56.1 P 1.) As a Senior Sales Specialist, Larimer was assigned to specific accounts and was responsible for selling Lotus software messaging products and software knowledge management products to those accounts. (Def. L.R. 56.1 P 8.)

At the time of his hire until sometime in the beginning of 2001, Larimer was supervised by District Manager Mary Freeman ("Freeman"). (Def. L.R. 56.1 P 9.) Larimer and Freeman had a good working relationship and Freeman had no bad experiences or exchanges with Larimer while she managed him or afterwards. (Pl. L.R. 56.1 P 2.)

From August through November 2000, Larimer was in an orientation period at IBM during which, regardless of his productivity, **[*5]** he was paid as if he met his sales goals. (Def. L.R. 56.1 P 10.) Beginning in December 2000, Larimer was subject to real sales goals that affected his compensation. (Def. L.R. 56.1 P 10.) Larimer's sales goals were broken into two parts -- a service component and a product component. (*Id.*) Larimer did not believe that he met the services part of his goal in December 2000. (*Id.*) Larimer received his first performance evaluation (referred to as his Personal Business Commitments ("PBC")), for the period ending December 31, 2000. (Def. L.R. 56.1 P 13.) He received an overall rating of "achieved some/most commitments"-- a 3 on a scale of 1 to 4 with 1 being the highest. (*Id.*) This PBC, which was given by Freeman, stated that Larimer had fallen just short of his December goals. (*Id.*) Freeman believed that Larimer was having difficulty making the transition from his work at Lucent to his work at IBM and demonstrated frustration in coming up to speed with the technologies. (Def. L.R. 56.1 P 14.) Freeman also believed that Larimer was "not taking enough initiatives of his own in aggressively engaging with his account set." **[*6]** (Pl. Resp. to Def. L.R. 56.1 P 14.)

In early 2001, John Freimark ("Freimark") replaced Freeman as Larimer's supervisor following Freeman's promotion into the position of acting and then Regional Director of the MidWest West Sales Region. n1(Def. L.R. 56.1 P 9.) Freimark "picked" Larimer to be on his sales team under his management because Freimark knew the accounts Larimer

would be covering based on Freimark's prior sales experience and because he knew Larimer's wife, Juliann, also an IBM employee, and believed that she would be of assistance to Larimer. (Def. L.R. 56.1 P 16.) Larimer had previously gotten along well with Freimark when both held the position of sales representative and Larimer welcomed the change in supervision. (Def. L.R. 56.1 PP 12, 16.)

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n1 At or around the time Freimark was promoted, he began a six-month long training course at IBM (completed in August 2001) that included training on IBM's discrimination policies-including the ADA. (Def. L.R. 56.1 P 19.)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*7]**

Larimer believed that he and other salespeople received more attention from Freimark than they had received from Freeman. (Def. L.R. 56.1 P 18.) Larimer testified that he and Freimark got along "okay" when he began reporting to Freimark and that there "was always a position of, again, critiquing successes and failures . . . ." (Def. L.R. 56.1 P 20.) On January 19, 2001, Larimer provided Freimark with his initial first quarter sales forecast. (Def. L.R. 56.1 P 21.) Larimer set forth his goals of earning $ 200,000 in 2001, achieving 200% of his sales quota in 2001 and 100% of his quota by July 2001, understanding and becoming proficient in communicating the benefits of all Lotus products, and understanding the internal tools and processes of Lotus/IBM. n2 (Def. L.R. 56.1 P 21.) As of January 2001, Larimer admitted that he was still working toward understanding the internal tools and processes of IBM as many had changed throughout his employment and that he was still learning about new products that were offered. (*Id.*; Pl. Resp. to Def. L.R. 56.1 P 21.)

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n2 The amount of Larimer's quota varied throughout his employment. (Def. L.R. 56.1 P 22.) Toward the end of his employment, Larimer's quota was to sell approximately $ 1.2 million in products and $ 1 million in services. (*Id.*)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*8]**

On or about April 4, 2001, Larimer attended a regional sales meeting in Milwaukee, Wisconsin. (Def. L.R. 56.1 P 24.) In attendance were members of Larimer's sales team (including managers Freeman and Freimark) as well as other managers and sales engineers who were involved in Larimer's team business. (*Id.*) Larimer reviewed his first quarter bookings and presented an account plan. (*Id.*) He admitted that at this time he was not at the point of reaching his goals. (Def L.R. 56.1 P 25.) Larimer had, in fact, changed his goals in his April 2001 presentation from meeting 200% of his assigned quota to meeting only 150% of the quota. (Def. L.R 56.1 P 26.)

After the April 4 presentation, Freimark realized that Larimer did not seem to understand what the critical business issues were for his accounts, why the customer was buying the product, what the value was that he was trying to sell, and what vision he was creating for the customer. (Def. L.R. 56.1 P 26.) Freeman also realized after Larimer's presentation that his performance was not where it needed to be. (*Id.*) Following the April 4 meeting, Freimark began having weekly telephone **[*9]** conversations with Larimer to discuss Larimer's sales opportunities and strategies. (Def. L.R. 56.1 P 28.) Freimark also established a buddy system whereby sales specialists Greg Fancher ("Fancher") and Vince Peseski ("Peseski") provided additional guidance and

informal assistance to Larimer. (Def. L.R. 56.1 P 29.)

On April 16, 2001, Freimark sent an e-mail to Larimer indicating that he had not seen any of Larimer's expense reports. (Def. L.R. 56.1 P 31.) Larimer responded on April 17, 2001, saying that he "needed to get caught-up" and that he would work on them that night. (*Id.*) Larimer did not complete the reports until the summer of 2001, which Larimer attributed to a new computer system being implemented. (Pl. Resp. to Def. L.R. 56.1 P 31.)

In late May or early June 2001, Larimer noticed a "definite change in tone and attitude in one case specifically" with regard to his relationship with Freimark. (Def. L.R. 56.1 P 33.) Freimark had become interested in a particular opportunity at Kemper Insurance, one of Larimer's accounts. (*Id.*) Freimark was "very interested" in Larimer's quote of some software to Kemper **[*10]** and was critical of Larimer for delivering the quote on the Friday before Memorial Day to a lower ranking individual at Kemper. (Def. L.R. 56.1 P 34.)

On June 21, 2001, Freimark held a meeting with Larimer in Chicago. At the meeting Larimer informed Freimark that he had just received a verbal (not written) acceptance of a sale that he had been "chasing" at Aon, although he was still forecasting it as a ten percent opportunity. (Def. L.R. 56.1 P 37.) Larimer believed that approximately $ 400,000 of the anticipated sale would come from the sale of licenses and that an additional $ 100,000 of the anticipated sale would come from subscriptions. (*Id.*) Freimark was critical of Larimer's performance relating to the Aon account. (Def. L.R. 56.1 P 38.) Specifically, Freimark had been coaching Larimer for months on how to turn what amounted to a compliance sale (i.e., working with IBM's compliance team to legally require Aon to buy a sufficient number of licenses for the product to cover Aon's use of the product) into a situation in which Larimer could wrap compliance into the

sale of additional products and services and utilize the solution selling **[*11]** model, which Larimer did not do. (*Id.*) Larimer also recalls Freimark being critical in a negative manner of Larimer's handling of opportunities at ABN-AMRO. (Def. L.R. 56.1 P 39.)

At this meeting Larimer recalls further criticism from Freimark, including that Freimark criticized Larimer for "selling on price," *i.e.*, selling the product as cheaply as possible rather than selling the quality of the product, that Larimer was "spending [his] time looking through the company books for what had sold and taking credit for it," and for not being able to sell product solutions to his customers. (Def. L.R. 56.1 P 41.) Freimark went on to explain to Larimer that he was being offered the opportunity to leave IBM with a separation package or be placed on a "performance plan" because Larimer had a lack of "pipeline" (*i.e.*, a lack of a pipeline of prospective sales), and did not have access to people in authority at his accounts. (Def. L.R. 56.1 P 40.) Specifically, Larimer was offered the choice between a severance package, which offered him the opportunity to receive a satisfactory rating, outplacement services, two months of salary, and the **[*12]** continuation of health insurance for six months, or a performance plan which Freimark informed Larimer he believed to be "not doable." (Def. L.R. 56.1 PP 43, 45.) Larimer had 30 days to decide which option to take, and understood that if he accepted the plan option and did not meet its requirements, his employment would be terminated. (Def. L.R. 56.1 PP 44, 45.) At this meeting, Freimark stated that he knew that health insurance was important for Larimer, and Larimer took this to mean that Freimark was implying that the severance package would best meet his health coverage concerns. (Def. L.R. 56.1 P 46.)

During the 30-day period in which Larimer had to consider the separation agreement, he was placed on a "pre-performance" plan. (Def. L.R. 56.1 P 48.) Larimer believed

that there were no goals under this pre-performance plan that were impossible to meet. (*Id.*) Moreover, Larimer submitted, with the exception of one week, completed forms on a weekly basis which related to his various accounts. (Def. L.R. 56.1 P 49.) Larimer believes that he fulfilled his goals under the pre-performance plan. (*Id.*)

At the end of the 30-day period, Larimer **[*13]** informed IBM's Human Resources department that he was not going to accept the separation agreement and that he was going to try the performance plan. (Def. L.R. 56.1 P 51.) Larimer stated that he decided to not accept the separation plan because he believed that he was closing in on some opportunities he was pursuing as well as meeting Freimark's specific requirements. (*Id.*)

On July 25, 2001, Larimer requested two weeks of parenting leave. (Pl. L.R. 56.1 P 17.) IBM denied the request for a two-week leave and instead allowed one week of parenting leave. (Def. Resp. to Pl. L.R. 56.1 P 18.) During this leave, Larimer was required to conduct business, meet his performance plan requirements, and was constantly contacted by Freimark and others to attend IBM business. (Pl. L.R. 56.1 P 19.) At some point in August 2001, Larimer received a bonus for sales achieved in June 2001. (Pl. L.R. 56.1 P 6.)

On August 9, 2001, Larimer attended the next regional sales meeting, where he prepared an account plan based on a format that was recommended to him by Freimark. (Def. L.R. 56.1 P 55.) During his presentation, Larimer **[*14]** received questions from two other salespeople, Fancher and Stephanie McDaniel ("McDaniel"). (Def. L.R. 56.1 P 56.) Larimer attributes Fancher and McDaniel's questioning to ill-will and believes that management asked McDaniel to interfere with the completeness of his presentation. (*Id.*) Following the meeting, McDaniel received a reduction in her assigned product sales quota. (Pl. Resp. to Def. L.R. 56.1 P 56.)

After Larimer's presentation, Freimark realized that Larimer "was not getting it yet." (Def. L.R. 56.1 P 58.) According to Freimark, Larimer was self-critical in his presentation by stating that he knew he had to make improvements and did not give the full presentation that Freimark had helped prepare. (*Id.*) Freeman agreed that Larimer did not understand his customers or their critical business needs. (*Id.*)

Over the next few days, the decision was made to terminate Larimer's employment. (Def. L.R. 56.1 P 59.) In addition to Larimer's showing at the August 2001 meeting, Freimark believed that the following contributed to Larimer's termination: (1) he failed to provide six solution selling bargain letters or pricing **[*15]** proposals to customers; (2) he failed to establish the services engagements at his accounts; (3) he failed to turn in his required paperwork on time or completed; and (4) he failed to fully understand the solution selling model. (Def. L.R. 56.1 P 59.) On August 17, 2001, Larimer was informed of his termination in a meeting with Freimark and Lori Harman, the manager of the sales engineers. (Def. L.R. 56.1 P 61.)

Larimer's Twin Daughters

On May 11, 2001, Larimer's twin daughters, Emelia and Sarah, were born at 28-6/7 weeks gestation. (Def. L.R. 56.1 P 88.) The birth weights of Emelia and Sarah were 1225 and 1060 grams respectively. (Pl. L.R. 56.1 P 31.) Both the children suffered from the following conditions:

. Respiratory distress syndrome (a lung problem characterized by the inability to make a substance called surfactant) from May 11, 2001 through May 15, 2001 (Emelia) and May 11, 2001 through May 22, 2001 (Sarah), at which times the conditions resolved.

. Suspected sepsis (a degree of suspicion for infection) from May 11, 2001 through May 14, 2001 (Emelia) and May 11, 2001 through May 13, 2001 (Sarah) at which **[*16]** times the suspected condition resolved.

. Hyperbilirubinemia of prematurity (jaundice) from May 12, 2001 through May 23, 2001 (Emelia) and May 11, 2001 through June 7, 2001 (Sarah), at which times the condition resolved.

. Apnea (temporary cessation of breathing) and bradycardia (slowing of the heart rate) from May 13, 2001 through June 21, 2001 (Emelia) and May 21, 2001 through July 4, 2001 (Sarah), at which time the condition resolved.

. Prematurity and twin gestation (Emelia and Sarah).

. A Grade III Intraventricular Hemorrhage ("IVH") (a bleeding of the brain), periventricular leukomalacia ("PVL") (evidence of a problem with the brain tissue) and the formation of a cyst (Emelia).

. A hemangioma, i.e., a vascular skin lesion that often involutes, on her nose (Sarah).

(Def L.R. 56.1 P 90.)

Emelia was hospitalized for a total of 47 days until June 26, 2001. (Pl. L.R. 56.1 P 32.) Sarah was hospitalized for 55 days until July 4, 2001. (*Id.*) Emelia initially suffered from respiratory distress syndrome and required endotrachael intubation and mechanical ventilation. (Pl. L.R. 56.1 P 33.) This mechanical ventilation included placing **[*17]** "a soft tube [in] the mouth with no cutting and is advanced into her little windpipe, and it assists her breathing, in this case for a short duration of two days." (Def. Resp. to Pl. L.R. 56.1 P

33, quoting Muraskas dep. 25.) Sarah suffered from similar breathing troubles and also required mechanical ventilation. (Pl. L.R. 56.1 P 34.) Without mechanical ventilation, Sarah and Emelia would not have survived. (*Id.*)

Emelia and Sarah were both unable to feed or suckle on their own. (Pl. L.R. 56.1 P 35.) Both were fed intravenously and then through a tube in the nose or mouth. (*Id.*) Absent mechanical feeding, the children would not have survived. (*Id.*) Emelia developed jaundice and was placed under phototherapy to reduce the levels of bilirubin. (Pl. L.R. 56.1 P 36.) She also suffered from apnea of prematurity, a condition where breathing ceases for short periods of time, leading to a fall in the heart rate. (*Id.*) She required cardiorespiratory monitoring and nearly six weeks of medication. Since their discharge and continuing to the present, both Sarah and Emelia suffer from various conditions. (Pl. L.R. 56.1 P 38.) **[*18]** Emelia's most serious and potentially long-lasting complication is Grade III IVH, a bleeding in her brain. n3 (Pl. L.R. 56.1 P 38.) Emelia also suffers from PVL, a problem with brain tissue and the formation of a cyst. (Pl. L.R. 56.1 P 40.) This condition typically occurs in an area where blood has been restricted, and brain cells are destroyed by or in conjunction with the hemorrhage. (*Id.*)

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n3 There are four grades of IVH bleeds, with Grade IV being the most severe. (Pl. L.R. 56.1 P 39.) Grade III bleeding can cause permanent brain damage. (*Id.*)

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Currently, it is uncertain if the children will suffer from ongoing physical, mental, or emotional impairments in the

future. (Pl. L.R. 56.1 P 43.) There may be long-term consequences of respiratory distress syndrome, and long-term complications of IVH can include cerebral palsy, mental retardation, motor problems, seizures, deafness, or blindness. (Pl. L.R. 56.1 P 44.)

IBM, through Freeman and **[*19]** Freimark, was aware of Juliann's difficult pregnancy and some of the medical complications the twins were facing. (Pl. L.R. 56.1 PP 51, 57; Def. L.R. 56.1 PP 106-107.) Larimer did call Freeman at some point stating -- based on an e-mail he had received from Vice President and General Manager, Lotus Amercias, Tom Millea ("Millea") dated April 13, 2001 (prior to the twins' births) -- that he believed he was being singled out based on his twins' medical costs. (Def. L.R. 56.1 P 87.) Freeman called Millea, who could not recall the e-mail except to say that he had sent a note wishing Larimer well. n4 (*Id.*)

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n4 In her deposition, Freeman responded to Larimer complaint as follows:
I was absolutely shocked and didn't even know how to respond because that thought never crossed my mind that a company of 350,000 employees that--I just--I was shocked. And I told him that. And I told him that, you know, to think that anyone at Lotus or IBM would have anything but well wishes and prayers for his family I thought was just beyond me. And that note specifically says, If there is anything we can do to help, let us know.

(Def. L.R. 56.1 P 87.)

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[*20]

IBM's Self Managed Plan

Larimer received health insurance benefits through IBM's Self Managed Plan ("Plan"). (Def. L.R. 56.1 P 108.) Empire BlueCross/Blue Shield ("Empire") is the contract administrator of the Plan. (*Id.*) Empire pays the claims and provides the customer service. (*Id.*) After paying a claim, Empire submits a request to IBM to fund the claim. (Def. L.R. 56.1 P 109.) Empire does not submit requests for funding on a claim-by-claim basis; rather, funding requests are based on the number of claims that have been processed within a given period of time. (*Id.*) IBM has no internal documentation regarding the payment of claims on behalf of the Larimers. (Def. L.R. 56.1 P 110.) In order to determine that information, a request has to be made of Empire. (*Id.*) There is no record within IBM of the amount of medical bills incurred by the Larimers nor does IBM maintain any records about the medical bills incurred by any of its employees. (*Id.*)

DISCUSSION

Larimer alleges in Count I that his termination violated the ADA because it was based on his association with persons with disabilities or perceived disabilities, **[*21]** those persons being his twin daughters. In Count II, Larimer alleges that IBM retaliated against him, in violation of § 510 of ERISA, for exercising his rights under IBM's health plan by filing for health benefits. The court addresses each Count in turn.

A. ADA Association Claim

HN2 The ADA prohibits discrimination against not only a qualified individual because of that individual's disability,

but also against a qualified individual based on that individual's association or relationship with a person who has a known disability. 42 U.S.C. § 12112(b)(4). The Seventh Circuit has not yet addressed such an association discrimination claim under the ADA, but other courts have provided a framework for examining such claims. HN3 To establish a *prima facie* ADA association claim, a plaintiff must show that (1) he was qualified for the job at the time of the adverse employment action; (2) he was subjected to an adverse employment action; (3) he was known by his employer at the time of the adverse employment action to have a relative or associate with a disability, and (4) the adverse employment action occurred under circumstances raising a reasonable inference **[*22]** that the disability of the relative or associate was the determining factor in the employer's decision. *Den Hartog* v. *Wasatch Acad.*, 129 F.3d 1076, 1085 (10th Cir. 1997); *Jackson* v. *Service Eng'g, Inc.*, 96 F. Supp. 2d 873, 879 (S.D. Ind. 2000); *Micek* v. *City of Chicago*, 1999 U.S. Dist. LEXIS 16263, No. 98 C 6757, 1999 WL 966970, at *11 n.6 (N.D. Ill. Sept. 30, 1999). The court will begin with the threshold question of whether the twins were, in fact, disabled within the meaning of the ADA.

HN4 Under the ADA, a disability is either (a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (b) a record of such impairment; or (c) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Larimer argues that his daughters were disabled based on both (a) and (c) above.

HN5 To prove that the twins were disabled based on (a) above, Larimer must show (1) the twins suffered from an impairment; (2) the impairment affects major life activities; and(3) the impairment "substantially limits" such major life activities. *Bragdon* v. *Abbott*, 524 U.S. 624, 631, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998); **[*23]** *Sinkler* v. *Midwest Prop. Mgmt. Ltd. P'ship*, 209 F.3d 678, 683 (7th Cir. 2000). Sufficient evidence exists in the record to show that the

twins suffered from impairments while Larimer was employed at IBM, including respiratory distress syndrome, "suspected" sepsis, jaundice, apnea, and bradycardia. Thus, the court will focus its analysis on whether a substantial limitation on a major life activity exists. HN6 A major life activity is an activity of central importance to daily life. *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams*, 534 U.S. 184, 197, 151 L. Ed. 2d 615, 122 S. Ct. 681 (2002). HN7 ADA regulations provide the following representative list of major life activities: caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning and working. *See* 29 C.F.R. § 1630.2(i). Moreover, as relevant to this case, the Seventh Circuit has expressly found eating to be a major life activity. *Furnish* v. *SVI Sys., Inc.*, 270 F.3d 445, 449 (7th Cir. 2001), quoting *Lawson* v. *CSX Transp., Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) ("eating constitutes a major life activity **[*24]** for purposes of the ADA."). HN8 A substantial limitation is defined under ADA regulations as

Unable to perform a major life activity that the average person in the general population can perform; or

significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1)(i). HN9 Factors to examine when determining whether an individual is substantially limited include,

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2)(i)-(iii).

Applying this ADA disability analysis to the facts of this case, there is evidence to suggest limitations on some of the twins' major life activities while Larimer was employed at IBM, particularly the ability of the twins to breath and eat. (See **[*25]** Pl. L.R. 56.1 PP 34-35.) As Larimer points out, conditions such as the respiratory distress syndrome, apnea and bradycardia, which both twins suffered from, affected their breathing because each twin could not breath without mechanical ventilation. (*Id.*) These breathing limitations, however, were not permanent. The respiratory distress syndrome lasted for Emelia from May 11, 2001 until May 15, 2001. For Sarah, it lasted from May 11, 2001 until May 22, 2001. (Def. L.R. 56.1 P 90.) The apnea and bradycardia lasted from May 13, 2001 through June 21, 2001 for Emelia and May 21, 2001 through July 4, 2001 for Sarah. n5 HN10 It is well established under the ADA that "disability does not include temporary medical conditions." *Waggoner* v. *Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999); *Matthews* v. *Commonwealth Edison Co.*, 128 F.3d 1194, 1197 (7th Cir. 1997)("the temporarily disabled are not protected by the Americans With Disabilities Act. . . ."); *Vande Zande* v. *State of Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) ("Intermittent, episodic impairments are not disabilities. . . ."); **[*26]** *Burns* v. *Chicago Park* Dist., 2002 U.S. Dist. LEXIS 16906, No. 99 C 3479, 2002 WL 31018363, at *1 (N.D. Ill. Sept. 9, 2002) ("To be sure, HN11 case law teaches that a purely temporary (rather than permanent or long term) impairment does not qualify as a 'disability' in ADA terms under Section 12102(2)(A)."); *West* v. *Westvaco Envelope Div.*, 2002 U.S. Dist. LEXIS 11221, No. IP 00-1940-CH-K, 2002 WL 1364158, at *6 (S.D. Ind. May 28, 2002) ("The applicable regulations and relevant case law show that West's temporary and intermittent conditions do not satisfy the ADA's requirement that a condition 'substantially limit' a major life activity."); *Schumacher* v. *Communications Contractors*, 152 F. Supp. 2d 971, 976 (N.D. Ill. 2001) ("The temporary nature of

Plaintiff's torn aorta precludes it from qualifying as a disability under the ADA."); *White* v. *Interior Crafts, Inc.*, 2001 U.S. Dist. LEXIS 3083, No. 00 C 5067, 2001 WL 290418, *2 (N.D. Ill. March 21, 2001) ("Whatever the severity of White's impairment, it was not the type of long term impairment that would constitute a disability under the ADA."). Any impairment in breathing posed by the respiratory distress syndrome, apnea, or bradycardia did not substantially affect the **[*27]** twins' breathing because of the relatively short duration and because it was temporary in nature.

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n5 Other impairments with a short duration included suspected sepsis, which lasted from May 11, 2001 through May 14, 2001 for Emelia and May 11, 2001 through May 13, 2001 for Sarah, and jaundice, which lasted from May 12, 2001 through May 23, 2001 for Emelia and May 11, 2001 through June 7, 2001 for Sarah. Larimer is not clear as to what major life activities were affected by these impairments. No evidence is presented as to what, if any, long lasting effects these conditions may have had.

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A similar analysis must apply when examining the life activity of eating, which Larimer specifically states was impaired. No impairment is pointed to as to why the twins could not eat on their own, but this is presumably because of their prematurity. Emelia was discharged from the hospital on June 26, 2001, and at this time she was taking her feedings by her mouth. (Def. L.R. 56.1 P 91.) Moreover, Sarah was discharged **[*28]** on July 4, 2001, and she also was taking all nutrition orally. (Def. L.R. 56.1 P 92.) As stated above, while there is evidence to suggest that the

twins' ability to eat was restricted by one or more impairments, the evidence does not support the notion that this was anything but a temporary restriction on this life activity and not a disability under the ADA.

The court must also look to the other impairments the twins suffered during the time that Larimer was employed at IBM that may have caused limitations which did not have such a short duration. At the time of their release from the hospital, Emelia suffered from Grade III IVH, PVL, prematurity and twin gestation. (Def. L.R. 56.1 P 91.) Long-term consequences of IVH can include cerebral palsy, mental retardation, motor problems, seizures, deafness or blindness, although it is unclear whether such complications will apply to Emelia. (Pl. L.R. 56.1 P 44.) Complications from PVL may result in cerebral palsy or learning disabilities. (Pl. L.R. 56.1 P 45.) Sarah suffered from hemangioma, prematurity and twin gestation when released from the hospital (Def. L.R. 56.1 P 92.), **[*29]** although an August 21, 2001 report by an ophthalmologist indicated that there was "no effect" Sarah's vision as a result of the hemangioma and at the time of a developmental evaluation on November 28, 2001, Sarah's hemangioma had begun involuting and she was no longer taking medication to treat it. (Def. L.R. 56.1 PP 92-93.) Finally, respiratory distress syndrome, which both twins suffered from, may have long term effects. (Pl. L.R. 56.1 P 44.)

After reviewing this evidence concerning the twins, the court concludes that insufficient evidence is presented to show that they are disabled under the ADA. At best, it is unclear whether the twins suffer from substantial limitations on major life activities. Doctors that have examined the twins have merely stated that it is uncertain whether the children will suffer from ongoing physical, mental, or emotional impairments. n6 (Pl. L.R. 56.1 PP 43.) The best Larimer can do, aside from conclusional statements unsupported by the record such as "These disabilities affect life activities. . . .,"

(Pl. L.R. 56.1 P 42.) n7, is to argue that there is the possibility of the children's suffering long-term disabling impairments **[*30]** and, at present, it is unclear whether major life activities are substantially limited. This is insufficient to meet the definition of the term "disabled" under the ADA. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999) ("Because the phrase 'substantially limits' appears in the Act in the present indicative form, we think the language is properly read as requiring that a person be presently--not potentially or hypothetically--substantially limited in order to demonstrate a disability."). Excerpts of Larimer's statement of material facts are as follows,

44. There could be long-term consequences of respiratory distress syndrome and, without speculation, it cannot be said that there will be no long-term consequences. [citations omitted].

45. It is difficult to say whether Emelia will suffer abnormalities from PVL, including cerebral palsy and learning difficulties. n8 [citations omitted].

46. It is presently possible that the children will suffer long-term disabling impairments, affecting their ability to see, hear, speak, breathe, or learn. [citations omitted].

The ADA is not meant to deal with **[*31]** such possibilities or even probabilities. Larimer has no evidence that his twins have long-term impairments that substantially limit major life activities and that these impairments affecting life activities were present when Larimer was employed at IBM. The court sympathizes with the difficulty that Larimer has encountered in establishing a disability under the ADA because of the young age of the twins. Nevertheless, Larimer lacks evidence of a substantial limitation on a major life activity. As such, he cannot prove that the children are disabled on this ground.

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n6 Dr. Robin Steinhorn, one of the twins' attending neonatologists, stated that she had no professional opinion as to whether Emelia or Sarah suffer from any long-term disabling impairments or have been substantially limited in their abilities to walk, see, hear, speak, breathe or learn. (Steinhorn dep. at 36-42.) Dr. Ruth Deddish, another of the twins' neonatologists, stated that as of April 2002 "both of children appeared to have no substantial issues in their development or their medical progress. . . ." (Deddish dep. at 37.)

n7 Portions of Dr. Steinhorn's deposition that Larimer cites in support of this notion read as follows:
Q: Is there anything in this document that would indicate to you that any of the conditions that Emelia suffered from at the time of her discharge were manifesting themselves in any way?
[objection]
A: I honestly can't say one way or another
***

Q: Do you have a professional opinion as to whether Emelia or Sarah suffered from any long-term disabling impairments?
A: No
[objection]
Q: Having in mind some of the documents that we've looked at and having in mind the treatment you provided to the two children, is there any indication in your view that either child has suffered from any substantial limiation in terms of the children's ability to walk, see, hear, speak, breathe, or learn?
[objection]
A: I cannot make that assessment.
***

Q:During the time that you treated the children, was there

any indication to you that during that time they suffered from any substantial limitation in terms of performing these major life activities?
***

A: I would not be able to make that assessment during hospitalization.
***

[objection]
These are premature babies. This feels like apples and oranges to me. You're asking me to make assessments that we can't make for premature babies. I can describe to you what they required. I can describe to you that they were premature, but I can't render an opinion on the specific question you asked.

(Steinhorn dep. at 36, 38-42.) **[*32]**

n8 The following interchange occurred at Dr. Deddish's deposition:
Q: What are the complications associated with--long term complications associated with PVL?
A: Well, in the vast majority of cases, there are none. But certainly it is one of the predecessors for lesions in the correct place for some sort of cerebral palsy. And certainly we obviously worry about learning disabilities.

(Deddish dep. at 51.)

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All is not lost for Larimer's ADA claim, however, so long as

he can show that IBM regarded the twins as disabled. 42 U.S.C. § 12102(2)(C). As explained by the Seventh Circuit, HN12 "To fall within the statutory definition of one "regarded as disabled," the plaintiff must show that:
(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or
(2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.

Sutton, 527 U.S. at 480. Under either formulation described in **[*33]** *Sutton*, the plaintiff must show that the defendant believes she is "substantially limited" in a "major life activity." *Id.*; 42 U.S.C § 12102(2)(A) & (C).

Mack v. *Great Dane Trailers*, 308 F.3d 776, 780 (7th Cir. 2002). HN13 "It is important to note that, in order to establish a 'regarded as' claim, it is not enough for a plaintiff to show that the employer knew of the plaintiff's impairment." *Amadio* v. *Ford Motor Co.*, 238 F.3d 919, 925 (7th Cir. 2001). A plaintiff must also show "that the employer believed that one or more of the plaintiff's major life activities were substantially limited by the plaintiff's impairment." *Id.*

IBM first attacks Larimer's "regarded as" claim on grounds that it is beyond the scope of Larimer's charge filed with the Equal Employment Opportunity Commission ("EEOC") and, therefore, should not be considered by the court. This argument is rejected. Larimer's charge filed with the EEOC alleged that he was discriminated against "based on [his] association with people with disabilities." (Def. L.R. 56.1 P 69.) Insofar as the ADA definition of disability includes someone **[*34]** "being regarded as having such an impairment," 42 U.S.C. § 12102(2)(C), the EEOC charge properly identified this claim. It did not need to specifically

identify this "regarded as" claim any more than it had to identify the claim that the twins were substantially limited in one or more major life activities. The definition of disability encompasses both. Moreover, even if it did not, this claim would properly be like or reasonably related enough to the EEOC charge for the court to address it. *See McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 481-82 (7th Cir. 1996).

Next, IBM argues that the evidence does not support the notion that anyone at IBM ever regarded the children as disabled. The court agrees. There is no dispute that both Freimark and Freeman were aware of the complications with Juliann's pregnancy, that the children were born prematurely, and that they were in the hospital with medical complications. (Pl. L.R. 56.1 PP 51-52, 57.) As mentioned above, however, simply being aware of any one impairment is not enough. Freeman and Freimark were required to have had a mistaken belief as to a substantial limitation on a major life **[*35]** activity, or a mistaken belief that a non-limiting impairment substantially limited a major life activity. Larimer's proof does not support such beliefs on the part of Freeman and Freimark. Larimer fails even to state which major life activity Freeman and Freimark regarded as substantially limited. His proof shows nothing more than that Freeman and Freimark were aware of the complications. Accordingly, the court rejects the claim that IBM regarded the twins as disabled.

Because Larimer fails to establish that the twins were either substantially limited in a major life activity or that IBM regarded them as such, he cannot show that they were disabled under the ADA. The ADA association claim, therefore, must fail. Summary judgment is granted in favor of IBM on the Count I claim.

B. Retaliation under ERISA

Larimer contends that his termination was in violation of § 510 of ERISA because it was in retaliation for his filing health care claims for his daughters. HN14 Section 510 of ERISA, 29 U.S.C. § 1140, prohibits an employer from discharging an employee "for the purpose of interfering with the attainment of any right to which [a plan] participant may [*36] become entitled" under an employee benefit plan. These substantive rights can be enforced pursuant to § 502 of ERISA, 29 U.S.C. § 1132, specifically, § 502(a)(3), which encompasses civil actions such as this one for violations of ERISA itself. 29 U.S.C. § 1132(a)(3); *Powell* v. *A T & T Communications, Inc.*, 938 F.2d 823, 825 (7th Cir. 1991).

IBM first argues that Larimer's ERISA claim should be dismissed because he failed to exhaust administrative remedies that were available to him. HN15 While neither § 502 nor § 510 speak to whether exhaustion of administrative remedies is a prerequisite to a civil action under ERISA, the "rule in this court is clear: the decision to require exhaustion as a prerequisite to bringing suit is a matter within the discretion of the trial court...." *Powell*, 938 F.2d at 825, citing *Dale* v. *Chicago Tribune Co.*, 797 F.2d 458, 466 (7th Cir. 1986), *cert denied*, 479 U.S. 1066, 93 L. Ed. 2d 1002, 107 S. Ct. 954, citing *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983). "As a general rule, an ERISA plaintiff [*37] must exhaust all available administrative remedies, but the requirement is relaxed in two instances: when a plaintiff is denied meaningful access to administrative procedures and when exhaustion would prove futile." *Adamczyk* v. *Lever Bros. Co.*, 991 F. Supp. 931, 934 (N.D. Ill. 1997).

Larimer admits that he received a copy of a Summary Plan Description pertaining to his health plan at IBM. (Def. L.R. 56.1 P 68.) This Plan contains a procedure through IBM's Human Resources Service Center to raise questions or claims in connection with the Plan. (*Id.*) IBM maintains that Larimer did not follow any such procedure and, therefore,

did not fulfill his administrative requirements. Neither party presents the court with information on exactly how Larimer was supposed to exhaust any administrative remedies, although their appears no disagreement that such administrative exhaustion remedies did exist. n9

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n9 IBM cites to Larimer dep. ex. 2, at P0527-28 as the provisions of the Plan requiring exhaustion. For whatever reason, IBM's exhibit contains only the odd numbered pages of this Plan. Therefore, the court only has P0527 before it, which, with the possible exception of the statement "You have the right to have the plan review and reconsider your claim," contains little mention of what procedure exists for review of claims in connection with the Plan. Inasmuch as Larimer admits that such a procedure exists, the court will assume that it does.

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Larimer's main argument in response refers to IBM's position as "preposterous" because Larimer is not suing the self-funded health plan for coverage but instead is suing his employer for an ERISA violation for denial of benefits. Larimer cites *Powell*, 938 F.2d at 825, as support. In fact, *Powell*, along with numerous other decisions of the Seventh Circuit, cut against Larimer's view. In *Powell*, a former employee sued his former employer alleging that he was discharged because the employer wanted to avoid paying his medical insurance and disability benefits in violation of § 510. *Id.* at 824. The plaintiff in *Powell* specifically brought suit against his former employer, A T & T, and not any Benefit Plan at issue. *Accord Lindemann* v. *Mobil Oil Co.*, 79 F.3d 647, 649-50 (7th Cir. 1996); *Kross*, 701 F.2d at 1244-45; *Lapka* v. *Juno Lighting, Inc.*, 1998 U.S. Dist.

LEXIS 2470, No. 96 C 6591, 1998 WL 102714, at *2 (N.D. Ill. March 3, 1998). The court in *Powell* noted "we take this opportunity to reaffirm this court's notion that a district court may properly require exhaustion of administrative proceedings prior to **[*39]** the filing of a claim involving an alleged violation of an ERISA statutory provision." *Powell*, 938 F.2d at 825. Thus, the court rejects Larimer's claim that he is excused from exhausting any Plan remedies because he is suing his employer.

In his response to IBM's statement of material facts, Larimer alleges that he exhausted any remedies because he called IBM's Human Resources Service center to make a "claim" before a "panel review." (Pl. Resp. to Def. LR. 56.1 P 68.) IBM claims that his panel review dealt not with the ERISA plan but instead was part of IBM's appeal program, whereby an employee may choose to file a grievance within 90 days concerning, among other things, discrimination or dismissals. In his paperwork on this claim, Larimer stated that he had been "unfairly terminated. Not given honest communication regarding reasons. Not given honest opportunity to correct/address given reasons. Not given reasonable time frame to perform due to personal situation/demands." (Def. Appx. Ex. 25.) For purposes of this motion, the court believes this claim sufficiently exhausted Larimer administrative remedies. Although IBM argues that this "panel review" **[*40]** comprised of IBM employees was unrelated to ERISA, the court simply does not have enough evidence before it to distinguish between this type of claim before the panel review or one brought under ERISA. Moreover, Larimer's panel review necessarily incorporated the reason that Larimer believed his was fired, *i.e.*, discrimination based on his children's condition and the expenses that would be associated with them. Larimer likely would have presented the same arguments before any separate review under ERISA, if, in fact, a separate review was required, and it is likely that the same decision would have been reached, resulting in nothing more than a delay in

the ultimate resolution of this case. Accordingly, the court rejects this argument.

HN16 Turning to the merits of Larimer's retaliation claim, to prove a violation of § 510, Larimer must establish more than a loss of benefits; he must show that IBM terminated him with "the specific intent of preventing or retaliating for the use of benefits." *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 295; *Little* v. *Cox's Supermarkets*, 71 F.3d 637, 642 n.3 (7th Cir. 1995). Larimer must show that "a desire to frustrate [his] attainment **[*41]** or enjoyment of benefit rights contributed toward [IBM's] decision...." *Teumer* v. *General Motors Corp.*, 34 F.3d 542, 550 (7th Cir. 1994). Larimer does not point to any direct evidence of retaliation under § 510. Thus, he proceeds using a modified version of the indirect method of proof under *McDonnell Douglas* v. *Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). HN17 To establish a *prima facie* case under § 510, Larimer must show that he (1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present. *Grottkau* v. *Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996); *Little*, 71 F.3d at 642. If Larimer were to meet his *prima facie* case, the burden would shift to IBM to offer a legitimate and non-discriminatory reason for the employment action. *Grottkau*, 79 F.3d at 73. If IBM were to make this showing, the burden would shift back to Larimer to show that IBM's proffered reason was a pretext. *Id.*

Inasmuch as not **[*42]** performing the essential functions of a job may shed light on whether an employee is qualified for a position, *see McPhaul* v. *Board of Comm'rs*, 226 F.3d 558, 563 (7th Cir. 2000), it is certainly questionable whether Larimer would pass part 2 of his *prima facie* case. Larimer admits that Freeman discussed deficiencies in his performance with him, that he was still learning the tools and processes of IBM as early as April 2001, that he conceded

his performance was not where it needed to be and that he disappointed Freimark by the way he handled a proposal on one of his accounts, sold on price rather than quality, searched company records to take credit on sales, lacked a sales "pipeline," did not have access to people in power at his accounts, and was not able to sell solutions to his customers. Moreover, after the August 2001 meeting, both Freimark and Freeman were disappointed with Larimer's presentation and both realized that he was not meeting or understanding the critical business needs of his clients. n10

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n10 This evidence would also be relevant to a legitimate nondiscriminatory reason for Larimer's termination, that being IBM's dissatisfaction with his performance. While Larimer maintains that the record "reeks" of pretext, he presents no persuasive reason other than his belief that his performance was excellent.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*43]**

Even if the court were satisfied that Larimer was qualified for the position, no reasonable trier of fact could find that he was discharged under circumstances that provide some basis for believing that the prohibited intent to retaliate was present. Indeed, the evidence to the contrary is far more substantial, as evidence suggests that IBM employees showed only concern for Larimer and his wife's coverage under IBM's health policy. Juliann Larimer testified that a conversation she had asking whether she was still covered under husband's plan was, in her belief, out of concern that she did not lose coverage. (Def. L.R. 56.1 P 85.) When Freimark gave Larimer the option of the performance plan or a severance package, he stated that the severance package would best meet his health care concerns and that he was

aware that health insurance was important for him. (Def. L.R. 56.1 P 46.) Larimer himself took this to mean that Freimark was implying that the severance package would best meet his health coverage concerns. (*Id.*) Furthermore, Juliann Larimer admitted that attempts were made after her pregnancy to find her a new job at IBM, which would have continued **[*44]** coverage for the Larimers. (Def. L.R. 56.1 85-86.) Such evidence certainly contradicts the notion that the costs of health coverage for the twins was the reason Larimer himself was fired. Finally, no evidence is presented that Freimark, Freeman or anyone at IBM had knowledge as to the amount of health claims being incurred, as such information was in the hands of Empire. Simply put, there is no evidence that IBM considered or relied on medical issues, much less that it had the specific intent of retaliating against Larimer for using such benefits. Summary judgment is granted in favor of IBM on the Count II retaliation claim under ERISA.

CONCLUSION

For the reasons stated above, IBM's motion for summary judgment is granted [# 30.] The clerk is instructed to enter judgment in favor of the defendant. All future dates, including the May 19, 2003 trial date, are stricken. This case is terminated.

ENTER:

JOAN HUMPHREY LEFKOW

United States District Judge

Dated: April 29, 2003

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing

before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY [*45] ORDERED AND ADJUDGED that defendant's motion for summary judgment is granted. Judgment entered in favor of defendant and against plaintiff.

Date: 4/29/2003

Supreme Court, U.S.
FILED
OCT 8 - 2004
OFFICE OF THE CLERK

No. 04-330

IN THE

Supreme Court of the United States

THOMAS LARIMER,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
SUCCESSOR IN INTEREST TO
LOTUS DEVELOPMENT CORP.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant review to interpret the association provision of The Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12112(b)(4), in the absence of a split of authority among the lower courts analyzing this provision and where the court of appeals properly affirmed the dismissal of Petitioner's claim on the ground that Petitioner had no evidence that he was discriminated against based on his association with any allegedly disabled individuals.

CORPORATE DISCLOSURE STATEMENT

Respondent International Business Machines Corp. ("IBM") is a publicly-traded New York corporation. IBM has no parent corporation and no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 2

A. Factual Background 2

B. The Litigation In The Courts Below 3

REASONS FOR DENYING THE PETITION 5

I. LARIMER HAS MISSTATED CONCLUSIONS OF LAW MADE BY THE SEVENTH CIRCUIT 5

II. THE SEVENTH CIRCUIT CORRECTLY ANALYZED LARIMER'S ADA ASSOCIATION CLAIM AND NO CIRCUIT SPLIT EXISTS 6

A. Larimer's Criticisms Of The Lower Courts' Conclusions Of Fact And Law Do Not Warrant Review By This Court 7

B. The Circuit Court's Decision Is Not In Conflict With Decisions Of Other Courts Of Appeals And There Are No Issues Raised By The Opinion Warranting This Court's Consideration 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Beck v. Dahn Corp.,
No. 96-1538, 1998 U.S. App. LEXIS 9709 (10th Cir. May 12, 1998) 13

Beckel v. Wal-Mart Associate, Inc.,
301 F.3d 621 (7th Cir. 2002) 9

Bunting v. Mellen,
124 S.Ct. 1750 (2004) 14

Den Hartog v. Wasatch Academy,
129 F.3d 1076 (10th Cir. 1997) 10, 11, 12, 13, 14

Drake v. Minnesota Mining and Manufacturing Co.,
134 F.3d 878 (7th Cir. 1998) 10

EEOC v. Prevo's Family Market, Inc.,
135 F.3d 1089 (6th Cir. 1998) 14

Ennis v. National Association of Bus. and Education Radio, Inc., 53 F.3d 55 (4th Cir. 1995) 13

Hilburn v. Murata Electronics North America, Inc.,
181 F.3d 1220 (11th Cir. 1999) 13

Humphrey v. Memorial Hospitals Association,
239 F.3d 1128 (9th Cir. 2001) 14

Isumi Semitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 8

Larimer v. IBM,
No. 02-C-3160, 2003 U.S. Dist. LEXIS 7396 (N.D. Ill. April 29, 2003) 4

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 12

TABLE OF AUTHORITIES
(Continued)

Page

Ogborn v. United Food and Commercial Workers Union, Local No. 881,
305 F.3d 763 (7th Cir. 2002) 8

Oliveras-Sifre v. Puerto Rico Department of Health,
214 F.3d 23 (1st Cir. 2000) 11, 13

Packwood v. Senate Select Committee on Ethics,
510 U.S. 1319 (1994) 8

Rizzo v. Children's World Learning Centers, Inc.,
213 F.3d 209 (5th Cir. 2000) 13

Rogers v. International Marine Terminals, Inc.,
87 F.3d 755 (5th Cir. 1996) 12

Salley v. Circuit City Stores, Inc.,
160 F.3d 977 (3rd Cir. 1998) 13

Sutton v. United Airlines, Inc.,
527 U.S. 471 (1999) 9

Tyndall v. National Education Centers, Inc.,
31 F.3d 209 (4th Cir. 1994) 12

Wascura v. City of South Miami,
257 F.3d 1238 (11th Cir. 2001) 13

STATUTES

29 U.S.C. § 1140 4

42 U.S.C. § 12112(b)(4) 1

RULES

United States Supreme Court Rule 10 7

OTHER AUTHORITIES

29 C.F.R. § 1630.8, App 5, 11

RESPONDENT'S BRIEF IN OPPOSITION

The ADA's association discrimination provision prohibits "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). In this case, the Seventh Circuit held that Petitioner Thomas Larimer ("Petitioner" or "Larimer") presented insufficient evidence to show that IBM terminated his employment based on his relationship with any disabled individuals where (1) Larimer could not show that the cost of health benefits for his allegedly disabled twin daughters was of concern to IBM, (2) the condition of prematurity and related medical afflictions of Larimer's twin daughters were neither communicable to Larimer nor predictive of his becoming ill or disabled, and (3) there was no evidence that Larimer was absent or distracted at work because of his daughters' alleged conditions. In affirming the district court's grant of summary judgment in favor of IBM, the Seventh Circuit's application of the ADA's association discrimination provision was entirely proper.

Petitioner attempts to create a circuit split by mischaracterizing both the nature and scope of the straightforward decision below. *First*, Petitioner errs in stating that the Seventh Circuit required that the disability belong to the plaintiff in an association discrimination case; a fair reading of the Seventh Circuit's opinion reveals that the circuit court reached no such holding. *Second*, the Seventh Circuit's interpretation of the ADA's association discrimination provision does not deviate from precedent of other courts that have interpreted that ADA provision. Moreover, even if this Court desires to interpret the association discrimination provision, this case is a singularly poor vehicle for doing so. The decision below was narrow and factbound and does not raise any important, unsettled

questions of federal law. The petition therefore should be denied.

STATEMENT OF THE CASE

A. Factual Background

Larimer was hired on August 28, 2000 as a Senior Sales Specialist in the Lotus Software Sales unit at IBM. (R. 31 ¶¶ 4, 6.)[1] As a Senior Sales Specialist, Larimer was responsible generally for selling Lotus software messaging and software knowledge management products to certain assigned accounts. (*Id.* ¶ 8.) From the beginning of his employment, Larimer fell short of meeting his sales goals and was informed by management of various deficiencies in his job performance. (*Id.* ¶¶ 11, 13, 14.) By the end of the first quarter of 2001, Larimer's total sales bookings were significantly lower than he projected (*id.* ¶¶ 21, 23) and in April 2001, Larimer admitted to his peers and supervisors at a regional sales meeting that he was not meeting his goals (*id.* ¶ 25).

Following relatively unsuccessful weekly meetings with Larimer in April and May 2001 designed to improve his performance (*id.* ¶¶ 27, 28, 30–32), Larimer was placed on a performance improvement plan on June 21, 2001 (*id.* ¶ 40). On August 17, 2001, Larimer was informed that he had not met all of the requirements of the performance plan and that his employment was being terminated. (*Id.* ¶ 61.)

Twins Emelia and Sarah Larimer were born on May 11, 2001 to Larimer and his wife, Juliann Larimer (also an IBM employee), at 28 6/7 weeks gestation. (*Id.* ¶¶ 70, 76, 77, 81,

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[1] IBM cites to the record from the district court as it was before the Seventh Circuit as "R. __" identifying the item by its number on the district court docket and providing a page or paragraph number if applicable.

88.) Emelia—who suffered a bleed in her brain after birth—was discharged from the hospital on June 26, 2001. (*Id.* ¶¶ 90–91.) Sarah—who had a hemangioma on her left nasal bridge—was discharged from the hospital on July 4, 2001. (*Id.* ¶¶ 90, 92.) Other than these afflictions and the prematurity and twin gestation of the children, the twins suffered from no other conditions after leaving the hospital. (*Id.* ¶¶ 91–92.) All developmental evaluations performed on the children through the time of summary judgment in this case demonstrated that the twins were developing normally. (*Id.* ¶¶ 93, 94–96, 101.) On September 10, 2001, Juliann Larimer voluntarily resigned her position at IBM in order to tend to the needs of her family. (*Id.* ¶¶ 78, 81.)

The Larimers received health insurance benefits through IBM's Self-Managed Plan ("Plan"). (*Id.* ¶ 108.) Empire BlueCross/BlueShield ("Empire")—the Plan's contract administrator—pays claims on behalf of participants and then submits requests to IBM to fund the claims. (*Id.* ¶¶ 108–09.) Larimer's managers had no information regarding Larimer's claims or medical bills (*id.* ¶ 110) and the amount of Larimer's claims did not affect, financially or otherwise, the management that employed and discharged Larimer. (R. 32, Ex. 53.) Through January 2003, IBM paid approximately $200,000 in medical bills for the twins. (R. 31 ¶ 111.)

Neither Larimer nor his family suffered any interruption in health insurance coverage as a result of Larimer's termination from IBM. (*Id.* ¶ 82.) Specifically, the Larimers were covered under the IBM health plan from the time of Larimer's hire through May 1, 2002, at which time they were covered under a health insurance plan through Juliann Larimer's new employer. (*Id.* ¶¶ 82–84.)

B. The Litigation In The Courts Below

On May 2, 2003, Larimer filed suit, alleging that he had been discriminated against based on his association with

persons with disabilities or perceived disabilities (i.e., his twin daughters) in violation of the ADA.[2] On April 29, 2003, the district court granted IBM's summary judgment motion and dismissed all of Larimer's claims against IBM. *See Larimer v. IBM*, No. 02-C-3160, 2003 U.S. Dist. LEXIS 7396 (N.D. Ill. April 29, 2003)/Pet. App. A-10–A-40. Regarding Larimer's ADA claim, the district court held that Larimer failed to show that his children had any long-term impairments that substantially limited major life activities while Larimer was employed at IBM or thereafter. (Pet. App. A-28–A-29.) Next, the district court rejected Larimer's argument that IBM regarded the children as disabled, holding that IBM management's knowledge of particular impairments of the children was insufficient to establish that IBM had a mistaken belief as to a substantial limitation on a major life activity. (*Id.* A-33.) Thus, because Larimer failed to establish that his children were disabled or that IBM regarded them as such, the district court granted summary judgment in IBM's favor on Larimer's ADA claim. (*Id.*)

On December 11, 2003, a three-judge panel of the Court of Appeals for the Seventh Circuit heard argument in Larimer's appeal of the district court's decision. On June 3, 2004, the court of appeals affirmed the district court's decision. (Pet. App. A-1–A-9.) In concluding that Larimer had presented no evidence that he was terminated because of his twin daughters' alleged conditions, the court of appeals described three categories of cases that in its view came within the intended scope of the "rarely litigated" association section of the ADA. (*Id.* A-4.) Relying on EEOC

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[2] Larimer also alleged that he had been terminated in violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, in retaliation for filing health claims relating to his twin daughters. (R. 1-1.) Because the ERISA claim is not the subject of the Petition before this Court, IBM does not discuss the lower courts' disposition of this claim.

Interpretive Guidance—contained in 29 C.F.R. § 1630.8, App. at 360—and case law from other circuits interpreting the ADA's association discrimination provision, the court of appeals identified the categories as "expense," "disability by association," and "distraction." (*Id.*) The court of appeals then provided the following "illustrations" of each: (1) "expense"; i.e., a dependent has a disability that is costly to the employer, (2) "disability by association"; i.e., the employee is likely to receive or develop the disability through contact or genetic transmission, and (3) "distraction"; i.e., the employee is inattentive at work because of the disability of a spouse or child. (*Id.*) Applying this interpretive analysis, the court of appeals concluded that Larimer's case fit none of the categories because (1) Larimer could not show that the cost of health benefits for his daughters was of concern to IBM, (2) the alleged conditions of Larimer's daughters were neither communicable to Larimer nor predictive of his becoming ill or disabled, and (3) there was no evidence that Larimer was absent or distracted at work. (*Id.* A-4–A-5.)

Petitioner did not seek rehearing or rehearing *en banc*, but filed a petition for certiorari to this Court on September 3, 2004.

REASONS FOR DENYING THE PETITION

I. LARIMER HAS MISSTATED CONCLUSIONS OF LAW MADE BY THE SEVENTH CIRCUIT

Larimer has misstated conclusions of law reached by the court of appeals in support of his request for review. Specifically, Larimer claims (at 9–10) that the court of appeals deviated significantly from established law when it purportedly held that Larimer "did not adequately establish his association claim because *he himself* was not disabled." Larimer goes on to argue at length that the court of appeals required—contrary to the ADA and the case law—that an

individual must be disabled in order to bring an association discrimination claim under the ADA. (Pet. 9–10.)

A fair reading of the decision of the court of appeals, however, confirms that no such conclusion was reached. Indeed, in attempting to define what it means to be a "qualified individual" entitled to protection under the ADA's association discrimination section, the court of appeals specifically *rejected* using the definition of a "qualified individual with a disability" that appears in the statute. (Pet. App. A-3.) Instead, the court of appeals held:

> The term "qualified individual" in that provision must simply mean *qualified to do one's job*, as assumed though nowhere discussed in the legislative history and the cases.

(*Id.*) (emphasis added) (citations omitted); *see also id.* A-6 ("A true parallel to *McDonnell Douglas* in the association setting would allow a prima facie case to be made out if the plaintiff, having shown that he was qualified in the sense of meeting his employer's expectations (not a 'qualified individual *with a disability*,' as we explained earlier) . . . .") (emphasis in original). Larimer clearly has misread and misinterpreted the circuit court's holding in this regard and the Petition should be denied insofar as it relies on a mistaken reading of the decision below.

II. THE SEVENTH CIRCUIT CORRECTLY ANALYZED LARIMER'S ADA ASSOCIATION CLAIM AND NO CIRCUIT SPLIT EXISTS

Larimer claims that the decision below creates a split in the lower courts regarding the proper way in which to analyze cases brought under the ADA's association discrimination provision and that the issue is significant enough to warrant this Court's review. A close examination of Larimer's arguments in support of this position and the circuit court's analysis confirms, however, that there is no

such split or issue and that Larimer has distorted the nature and scope of the decision below.

A. Larimer's Criticisms Of The Lower Courts' Conclusions Of Fact And Law Do Not Warrant Review By This Court

Larimer contends that the district court inappropriately concluded that his daughters were not disabled or regarded as disabled by IBM, that the circuit court wrongly concluded that the conditions of the twins were merely temporary, and that both courts failed to construe the facts in the light most favorable to Larimer. (Pet. 8–9, 10–13, 15–16.) The district court—relying on uncontroverted material facts—devoted a significant portion of its opinion to the question of whether the twins were disabled, or regarded as such, and concluded that they were not. (Pet. App. A-26–A-33.) The circuit court commented that Larimer's daughters "seem[ed] fine at present" and declined to address Larimer's regarded-as argument. (Pet. App. A-2–A-3.) Larimer's argument that these issues warrant review by this Court fails for several reasons.

First, the district court's conclusions are not properly the subject of a petition for a writ of certiorari to this Court. The provisions of Supreme Court Rule 10 on which Larimer relies in support of his Petition plainly speak to issues raised by a decision of a "United States court of appeals"—and not an underlying district court decision. Simply stated, Larimer's quibbles with certain specifics of the district court's decision are not properly examinable here.

Second, Larimer's arguments that the lower courts erred in concluding that the children were not disabled (or regarded as disabled) or inappropriately construed summary judgment standards are not issues that warrant this Court's review. Supreme Court Rule 10 specifically provides that a petition for a writ of certiorari "is *rarely* granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R.

10 (emphasis added). As explained above, Petitioner has presented a highly exaggerated and misleading picture of what the Seventh Circuit held in this case. In fact, he ultimately admits (at 10–13) that his complaint boils down to a disagreement with the way that the lower courts applied the ADA's association discrimination provision to a set of specific facts to conclude that his three-month old twin daughters were not disabled at the time of his discharge. This Court, however, does not grant certiorari to resolve factbound applications of legal standards. *See Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320–21 (1994); *Isumi Semitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993). No exception is warranted here. The Seventh Circuit's conclusion that the twins were "fine" is on its face a narrow, factbound application of the ADA's association discrimination provision. And, even if the children were disabled, the Seventh Circuit concluded that Larimer cannot prevail because he could not show that IBM had a motive to discriminate against him, making any conclusion regarding disability not dispositive. (Pet. App. A-3, A-7.)

Moreover, the uncontradicted evidence confirms that Larimer's children are not disabled. According to the uncontroverted testimony of the children's treating physicians, the conditions of respiratory distress syndrome, "suspected" sepsis, and jaundice, from which the twins initially suffered after their births on May 11, 2001, all had been resolved by approximately June 21, 2001, and their apnea and bradycardia had been resolved by the time of their discharges from the hospital on June 26 and July 4, 2001. (R. 31 ¶¶ 90–92.) It is well-established that temporary conditions or impairments do not constitute disabilities within the meaning of the ADA. *See, e.g., Ogborn v. United Food and Commercial Workers Union, Local No. 881*, 305 F.3d 763, 767 (7th Cir. 2002) (depression that lasted just over eight weeks not a disability under the ADA). As to the conditions that remained—prematurity (Emelia and Sarah),

twin gestation (Emelia and Sarah), a hemangioma (Sarah), and a brain bleed and cyst (Emelia)—none of the children's treating physicians testified that these conditions constituted disabilities or that they substantially limited the children in any major life activity. (R. 31 ¶¶ 97–98, 101–02.) In fact, all of the developmental evaluations of the children confirm that the children's growth, neurological and physical assessments have been within normal limits. (*Id.* ¶ 92–104.) And, any "possibility" that the children will suffer from future complications and/or impairments is insufficient as a matter of law to state a claim for disability discrimination under the ADA. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999) ("Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.").

As to Larimer's argument that the district court inappropriately relied more on IBM's facts that Larimer's, Larimer himself effectively admitted approximately 100 out of 111 of IBM's factual statements. (R. 37.) Also, concerning the additional facts submitted by Larimer in opposing IBM's summary judgment motion, the district court appropriately concluded that many of those assertions were based on an inadmissible affidavit and unsupported by the evidence. (R. 41, 42.) Larimer's own "lawyer drafted affidavit" contradicted his deposition testimony and contained facts entirely lacking in foundation or personal knowledge. It is well-established that such assertions are unreliable and entitled to no weight at the summary judgment stage. *See Beckel v. Wal-Mart Assoc., Inc.*, 301 F.3d 621, 623 (7th Cir. 2002) ("Affidavits, though signed under oath by the affiant, are typically and here written by the affiant's lawyer, and when offered to contradict the affiant's deposition are so lacking in credibility as to be entitled to zero weight in summary judgment proceedings unless the affiant gives a plausible explanation for the

discrepancy."); *Drake v. Minnesota Mining and Manufacturing Co.*, 134 F.3d 878, 887 (7th Cir. 1998) (finding that conclusory allegations in co-worker's affidavit were correctly stricken).

Either way, Larimer's arguments that the lower courts erred in their factual findings or applications of summary judgment standards do not warrant this Court's review.

B. The Circuit Court's Decision Is Not In Conflict With Decisions Of Other Courts Of Appeals And There Are No Issues Raised By The Opinion Warranting This Court's Consideration

Petitioner attempts (at 8, 14–15) to present a material conflict with other circuits by arguing that the circuit court's decision deviates from the "standard association analysis" established by the Tenth Circuit Court of Appeals in *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1085 (10th Cir. 1997), such that this Court's review of the issue is necessary to establish a firm and clear ruling on the ADA's association discrimination provision. This assertion, however, is incorrect. There is nothing in the decision below that conflicts with *Den Hartog*, or any of the decisions of other courts of appeals interpreting the ADA's association discrimination provision. In fact, a close review of the decisions of those courts of appeals—including the Seventh Circuit here—demonstrates that the courts of appeals are consistently and appropriately analyzing the ADA's association discrimination section and that there is no compelling issue that needs to be settled by this Court.

The court of appeals in its decision below held that, in its view, there are three types of situations within the intended scope of the ADA's association discrimination provision, which could be illustrated as follows: (1) "expense"; i.e., a dependent has a disability that is costly to the employer, (2) "disability by association"; i.e., the employee is likely to receive or develop the disability through contact or genetic transmission, and (3) "distraction"; i.e., the employee is

inattentive at work because of the disability of a spouse or child. (Pet. App. A-4.) In reaching this conclusion, the court of appeals specifically relied on the EEOC's Interpretive Guidance to the ADA's association discrimination provision that sets forth these very three examples at 29 C.F.R. § 1630.8, App. at 360. Significantly, the Tenth Circuit in *Den Hartog*, in explaining what in its view would be required to make out a case of discrimination under the ADA's association discrimination provision, discusses some of these very same examples, as noted by the court of appeals below. *See* Pet. App. A-7 ("Better to require, as *Den Hartog* does though not in precisely these words, that the plaintiff present evidence that his case falls in one of the three categories in which an employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person."). In fact the Tenth Circuit in *Den Hartog* cited to and endorsed the *exact same* Interpretive Guidance relied on by the court of appeals below. *See Den Hartog*, 129 F.3d at 1085–86, n.6. It also referenced the concern expressed in the Committee Report of the House Committee on Education and Labor that an employer might decline to hire an individual with a relative with a disability based on an assumption "without foundation that the applicant will have to miss work or frequently leave work early or both . . . ." *Den Hartog*, 129 F.3d at 1082. Under such circumstances, Petitioner's argument that the Seventh Circuit, in relying on the EEOC's Interpretive Guidance to define the parameters of what constitutes unlawful conduct under the ADA's association discrimination provision, deviated from any standards set forth by the court of appeals in *Den Hartog* is erroneous.

Equally clear is the fact that several courts of appeals that have addressed and interpreted the ADA's association discrimination provision similarly have looked to and relied upon the EEOC's Interpretive Guidance setting forth the three above-mentioned illustrations of situations in which discrimination could occur. *See, e.g., Oliveras-Sifre v.*

Puerto Rico Dep't of Health, 214 F.3d 23, 26 (1st Cir. 2000) (relying on *Den Hartog*'s endorsement of the "three examples of forbidden association discrimination set out in [the EEOC's] Interpretive Guidance"); *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209, 214 (4th Cir. 1994) (relying on the EEOC's Interpretive Guidance in the context of prohibiting discrimination based on a concern that an employee will miss work in order to take care of a disabled person); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 760–61 (5th Cir. 1996) (same). Accordingly, Petitioner's attempt to characterize the court of appeals' decision below as a departure from the case law from other courts of appeals interpreting the ADA's association discrimination provision rings hollow.

Petitioner's claim of a circuit split fails for the additional reason that the court of appeals below endorsed the analytical framework for proving a case of disability discrimination defined by *Den Hartog*. The *Den Hartog* court held that a variation of the fourth prong of the prima facie case defined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), was appropriate in cases brought under the ADA's association discrimination provision, and that a plaintiff bringing an association claim establishes a prima facie case by showing that: "(1) the plaintiff was 'qualified' for the job at the time of the adverse employment action; (2) the plaintiff was subjected to adverse employment action; (3) the plaintiff was known by his employer at the time to have a relative or associate with a disability; (4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision." *Den Hartog*, 129 F.3d at 1085. The court of appeals below noted that the *Den Hartog* test was "sound" and that the fourth prong of *Den Hartog* effectively requiring a plaintiff to present evidence that his employer had a "motive to discriminate" was preferable to the *McDonnell Douglas* requirement than

an individual simply show that he was replaced by someone not of the protected classification. (Pet. App. A-6–A-7.) The fact that the court of appeals also discussed the EEOC's Interpretive Guidance as helpful in determining what would constitute a reason to discriminate in no way raises a circuit split or creates inconsistent interpretations of the ADA's association discrimination provision.

It is clear that the *substance* of the *Den Hartog* standard has been—like it was in the decision below—consistently used, accepted and applied by the courts of appeals that have addressed the ADA's association discrimination provision outside of the Tenth Circuit. *See Oliveras-Sifre*, 214 F.3d at 26 (favorably citing certain requirements of the *Den Hartog* prima facie case); *Ennis v. National Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d 55, 58–59 (4th Cir. 1995) (preceding *Den Hartog* but similarly requiring that the plaintiff present "some other affirmative evidence that disability was a determining factor in the employer's decision" as part of the fourth prong of the prima facie case); *Wascura v. City of South Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001) (favorably citing adoption of *Den Hartog* standard by Eleventh Circuit in *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1230–31 (11th Cir. 1999)).

Petitioner (at 14) cites several cases—in addition to *Den Hartog*—in arguing that a split exists among the lower courts regarding the proper interpretation of the ADA's association discrimination provision. *Oliveras-Sifre* and *Hilburn*, as set forth above, and *Beck v. Dahn Corp.*, No. 96-1538, 1998 U.S. App. LEXIS 9709, at * 8 (10th Cir. May 12, 1998), however, follow the analysis of *Den Hartog*, which as noted, was effectively endorsed by the Seventh Circuit. The remaining cases, however, discuss—and apply—other holdings and dicta of *Den Hartog* and thus are not relevant here. *See Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3rd Cir. 1998) (relying on *Den Hartog*'s discussion of the accommodation obligations of an employer to an employee who is addicted to drugs or alcohol); *Rizzo v.*

Children's World Learning Centers, Inc., 213 F.3d 209, 212–13 n.2 (5th Cir. 2000) (citing *Den Hartog*'s requirement that whether a disabled individual is a direct threat is an affirmative defense on which the defendant ordinarily has the burden of proof); *EEOC v. Prevo's Family Market, Inc.*, 135 F.3d 1089, 1102 (6th Cir. 1998) (citing *Den Hartog* in dissenting opinion for the proposition that an independent medical examination is not required when available objective evidence as to whether a disabled individual constitutes a "direct threat" in the workplace is clear); *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1139–40 (9th Cir. 2001) (citing *Den Hartog* for the proposition that conduct resulting from a disability generally is considered to be part of the disability rather than a separate basis for termination).

Based on the foregoing, Petitioner's argument that the circuit court below somehow deviated from the legal principles relied upon by the *Den Hartog* court of appeals or other courts of appeals interpreting the ADA's association discrimination provision is wrong. The Seventh Circuit relied on the same Interpretive Guidance cited by the *Den Hartog* court to clarify what type of evidence must be marshaled by a plaintiff attempting to prove association discrimination under the ADA. It similarly cited the *Den Hartog* test as "sound" and did not in any way place itself in conflict with the consistent interpretations of other courts of appeals addressing this very issue. There simply is no unsettled question of law implicated by the decision below to be addressed by this Court. *See Bunting v. Mellen*, 124 S.Ct. 1750, 1752 (2004) (the absence of a direct conflict among the circuits supports the denial of a petition for writ of certiorari). The courts of appeals have been consistent in their interpretations of the ADA's association discrimination provision. Accordingly, this case presents no circuit split or other compelling reason justifying review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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